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## GOVERNMENT LIABILITY IN TORT

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The common law and the political theory underlying both British and American constitutional law have been regarded as a bulwark of protection to the individual in his relations with the Government. The "rule of law" which Dicey and others extol is designed by judicial control to restrict within the bounds of legality the operation of the governmental machine in its contact with the citizen. Yet it requires but a slight appreciation of the facts to realize that in Anglo-American law the individual citizen is left to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State's functions, an unjust burden which is becoming graver and more frequent as the Government's activities become more diversified and as we leave to administrative officers in even greater degree the determination of the legal relations of the individual citizen. Obviously the Administration cannot be held to the obligation of guaranteeing the citizen against all errors or defects, for life in an organized community requires a certain number of sacrifices and even risks. The unexampled expansion of the police power in the United States daily illustrates the uncompensated sacrifices to which the individual is exposed by the rightful operation of the State's public powers. Yet there is no reason why the most flagrant of the injuries wrongfully sustained by the citizen, those arising from the torts of officers, should be allowed to rest, as they now generally do, in practice if not in theory, at the door of the unfortunate citizen alone. This hardship becomes the more incongruous when it is realized that it is greatest in countries like Great Britain and the United States, where democracy is assumed to have placed the individual on the highest plane of political freedom and individual justice. When Justice Miller of the United States Supreme Court remarked in *Gibbons v. United States*<sup>1</sup> that "no govern-

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<sup>1</sup> (1868, U. S.) 8 Wall. 269.

ment has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers or agents," his horizon was extremely limited, for he overlooked the fact that practically every country of western Europe has long admitted such liability. There seems no sound reason why the English-speaking countries, where the public service is usually in less professional hands than on the continent, should not adopt modern social and legal principles in determining the legal relations between the Government in its administration of the public services, the officers and agents whom it employs for this service, and the individual members of the community. It was Lord Macaulay who remarked that "the primary end of Government is the protection of the persons and property of men."

The reason for this long-continued and growing injustice in Anglo-American law rests, of course, upon a medieval English theory that "the King can do no wrong," which without sufficient understanding was introduced with the common law into this country, and has survived mainly by reason of its antiquity.<sup>2</sup> The facts that the conditions which gave it birth and that the theory of absolutism which kept it alive in England never prevailed in this country and have since been discarded by the most monarchical countries of Europe, have nevertheless been unavailing to secure legislative reconsideration of the propriety and justification of the rule that the State is not legally liable for the torts of its officers. To be sure, we profess to ease the conscience by according the injured individual an action against the wrong-doing officer—frequently a person without pecuniary responsibility—or else, under our decentralized system of administration, by permitting an action against political subdivisions of the State and local bodies and corporations for injuries inflicted when acting in their "private" or "corporate" as distinguished from their "governmental" capacities. But no serious effort has been made to penetrate the mysticism encumbering this department of the law and to relieve it of its theological and metaphysical conceptions and misconceptions.

Realization, spasmodically by the courts, and occasionally in particular cases by legislatures, of the unwarranted hardship often worked by the rule that the State is not liable for the torts of its officers, and the desire to square the demands of justice with the maintenance of a legal anachronism canonized as a legal maxim, have brought about the result, by the introduction of fictions, artificial distinctions and concessions to

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<sup>2</sup> That this maxim was misunderstood even by Blackstone and Coke, see the excellent monograph of Ludwik Ehrlich, *Proceedings against the Crown* (1921) 42-49. The maxim merely meant that the King was not privileged to do wrong. If his acts were against the law, they were *injuriae* (wrongs). Bracton, while ambiguous in his several statements as to the relation between the King and the law, did not intend to convey the idea that he was incapable of committing a legal wrong. Ehrlich, *op. cit.*, 43. Indeed, there appears to have been a considerable measure of redress obtainable, though not damages. *Ibid.* 44-46.

expediency, that the law governing the redress of the individual against the public authorities, national, State, or municipal, for injuries sustained in the exercise of governmental powers, is in a state of incongruity and confusion unique in history. The hazards run by the administrative officer who may have acted in perfect good faith, and by the private individual, illustrated in such cases as *Miller v. Horton*<sup>3</sup> and *Little v. Barreme*,<sup>4</sup> manifest defective social engineering—to use Roscoe Pound's term—hardly creditable to an enlightened community. The injustice of the prevailing rule is recognized in England, and a movement for the reform of the law in this respect is now in progress.<sup>5</sup> The difficulty, of course, lies in the fact that we consider ourselves bound by the fetters of a medieval doctrine, often regarded as having the institutional impregnability of an article of faith, which never had much, if any, justification, and that legislatures have been unwilling to reexamine the whole subject from the point of view of theory and history, in order to bring the law into harmony with the practical exigencies of modern life. Such an attempt these articles propose to make. In the course of the work, effort will be directed to pointing out the anomalies and paradoxes in the present state of the law, the present lack of theoretical justification for the prevailing doctrine of irresponsibility, the theories on which the responsibility of the State has been justified, the history of the doctrine of responsibility, and the state of the law in continental Europe. With this exposition, it is hoped that it will have been demonstrated that justice and a respect for the rights of the individual demand that Government, national, state and municipal, shall now adopt the necessary legislation to admit the legal responsibility of the State or city for the torts of its officers. At best, that liability will not be unlimited, and an attempt will be made to indicate the appropriate bounds of the proposed doctrine. If the reader should become convinced that the most flagrant and tortious of the invasions of the rights of the individual by act of public authority justify, not an individual sacrifice, but a distribution of the burden among the community at large, it may become possible to suggest an acceptable social and legal theory upon which many sacrifices and burdens now right-

<sup>3</sup> *Miller v. Horton* (1891) 152 Mass. 540, 26 N. E. 100. Here health officers, experts, concluding after investigation that a horse was afflicted with glanders, ordered its destruction, and were later held liable in damages for what a jury found to be a mistaken conclusion of fact.

<sup>4</sup> *Little v. Barreme* (1804, U. S.) 2 Cranch, 170; *Elmore v. Fields* (1907) 153 Ala. 345, 45 So. 66.

<sup>5</sup> See W. S. Holdsworth in (1922) 38 L. QUART. REV. 295. See Ministry of Transport Act (1919) 9 & 10 Geo. V, c. 50, sec. 26 which provides that "the Minister . . . shall be responsible for the acts and defaults of the officers and servants and agents of the Ministry in like manner and to the like extent as if they were his servants." See also Ministry of Munitions and Shipping (Cessation) Act 1921 discussed in *Marshall Shipping Co., Ltd. v. Board of Trade* (1923, C. A.) 39 T. L. R. 415.

fully imposed under the police power would more equitably be distributed under the power of eminent domain.

#### ANOMALIES IN ANGLO-AMERICAN LAW

Taking it for granted that in Anglo-American law the Crown or State cannot be sued without its consent, it will nevertheless be of some interest to observe how this maxim came into existence, its theoretical basis and its present application. The examination of its origins in English legal history and the criticism of the theories on which it has been justified, will be left for later discussion. At this point, it is proposed merely to examine some of the vicissitudes of the doctrine, the doubtful expedients and distinctions adopted by the courts in squaring its application with an effort to do occasional justice and the barren inconsistencies and anomalies into which the law has thus been led.

Blackstone has attributed the maxim that "the King can do no wrong" to the royal prerogative, which he defines as "that special pre-eminence which the King hath over and above all other persons, and out of the course of the common law, in right of his royal dignity. . . . The law ascribes to the King the attribute of sovereignty"; he is "sovereign and independent" within his own dominions and "owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction over him, for all jurisdiction implies superiority of power."<sup>6</sup> Chitty adds that "the inviolability of the King is essential to the existence of his powers as supreme magistrate; and therefore his person is sacred. The law supposes it impossible that the King himself can act unlawfully or improperly. It cannot distrust him whom it has invested with the supreme power; and visits on his advisors and ministers the punishment due to the illegal measures of government. Hence the legal apothegm that the King can do no wrong."<sup>7</sup>

Nothing seems more clear than that this immunity of the King from the jurisdiction of the King's courts was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution. Admitting its application to the sovereign and its illogical ascription as an attribute of sovereignty generally, it is not easy to appreciate its application to the United States, where the location of sovereignty—undivided sovereignty, as orthodox theory demands—is a difficult undertaking. It is beyond doubt that the Executive in the United States is not historically the sovereign,<sup>8</sup> and the legislature, which is perhaps the deposi-

<sup>6</sup> I Commentaries 239, 241-2.

<sup>7</sup> Chitty, *The Law of the Prerogative of the Crown* (1820) 5.

<sup>8</sup> 2 Goodnow, *Comparative Administrative Law* (1893) 156. *United States v. Lee* (1882) 106 U. S. 196, 205, 1 Sup. Ct. 240.

tory of the widest powers, is restrained by constitutional limitations. The federal government is one of delegated powers and the states are not sovereign, according to the Constitution, as demonstrated forcibly by the Civil War and the resulting Amendments. That brings us to the only remaining alternative, that sovereignty resides in the American electorate or the people.<sup>9</sup> Thus, we are led to the conclusion that the prerogative of the King's immunity from the jurisdiction and alleged resulting infallibility, the apotheosis of absolutism, have by evolution devolved upon the democratic American people, presumably both as citizens of the States and of the United States. The awkwardness of this conclusion is heightened by the fact that whereas in England, to prevent the jurisdictional immunity resulting in too gross an injustice, the petition of right, whose origin has been traced back to the thirteenth century,<sup>10</sup> was devised as a substitute for a formal action against the Crown, in America no substitute except an appeal to the generosity of the legislature has in most jurisdictions been afforded. In only a few states is judicial relief available. The difficulty of reconciling the royal prerogative with democratic government has, in fact, led some of our courts to deny the applicability of the English doctrine of kingly immunity and put it merely on the general ground of public policy, or what Justice Miller called "the general doctrine of publicists," that "the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts."<sup>11</sup> It will be recalled, however,

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<sup>9</sup> In *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064, Mathews, J., said: "In our system, while sovereign powers are delegated to the agencies of government,"—a somewhat doubtful proposition—"sovereignty itself remains with the people by whom and for whom all government exists and acts." So Miller, J., in *United States v. Lee* (1883) 106 U. S. 196, 208, 1 Sup. Ct. 251: "Under our system the people . . . are the sovereign." See also LeRoy G. Pilling, *An Interpretation of the Eleventh Amendment* (1917) 15 MICH. L. REV. 468. We shall later criticize the theory of popular sovereignty.

<sup>10</sup> Its origin is uncertain. See the evidence for and against its origin in an enactment of Edward I in Clode, *The Law and Practice of Petition of Right* (1887) 2-4. Ehrlich, *op. cit.*, 83 *et seq.* Holdsworth, *The History of Remedies against the Crown* (1922) 38 L. QUART. REV. 141, 147, 286 *et seq.* Robertson, *Civil Proceedings against the Crown* (1908) 330 *et seq.* In *Monckton v. Atty. Gen.* (1850, Ch.) 2 Mac. & G. 402, 412, Lord Cottenham said: "The proceeding by petition of right exists only for the purpose of reconciling the dignity of the Crown and the rights of the subject, and to protect the latter against any injury arising from the acts of the former; but it is no part of its object to enlarge or alter those rights." The construction denying relief for torts has greatly narrowed the injuries for which the subject can sue by petition, and yet the petition is broader in its remedies than are the bulk of the American statutes and decisions.

<sup>11</sup> *United States v. Lee* (1883) 106 U. S. 196, 1 Sup. Ct. 249. See also *Langford v. United States* (1879) 101 U. S. 341, 343, in which Miller, J., remarked that "we do not understand that either in reference to the government of the United States, or of the several states, or of any of their officers, the English maxim has any

that it took a constitutional amendment, the eleventh, to establish this as an American federal policy with respect to the states of the union, for in the case of *Chisholm v. State of Georgia*<sup>12</sup> only one dissenting judge, Iredell, sustained the principle of immunity as fundamental.<sup>13</sup>

No doubts have been expressed as to the jurisdiction of the federal Supreme Court over suits by one State against another or by the United States against a State. Yet it remains true that an individual cannot sue a State without its consent, either in its own or in the federal courts.<sup>14</sup> Since many states have not yet granted such consent and since those that have, have so qualified it as to exclude practically all cases of liability for tort, it is proper to show that the reasons which once may have been deemed to justify the public policy of immunity from suit and responsibility do not in fact to-day prevail, and that public policy now requires that the State shall voluntarily submit to the jurisdiction of judicial tribunals to answer for torts committed by its officers against the person or property of its citizens. Whether a valid distinction can analytically be drawn between substantive liability—as on contract, as some courts insist<sup>15</sup>—and procedural immunity from suit, is a question which will be more fully considered in the discussion of theory in the second part of this study.

The English system of subjecting the Crown to suit by petition of

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existence in this country." But Professor Burgess adopts the full theory that "the State can do no wrong." 1 *Political Science and Constitutional Law* (1891) 57. In *Langford v. United States*, *supra*, it is said "The English maxim does not declare that the Government, or those who administer it, can do no wrong."

<sup>12</sup> (1793 U. S.) 2 Dallas 419, 429. Chief Justice Jay (at p. 471) saw no incompatibility between suability and sovereignty. Cf. Mr. Justice Holmes, *infra*. Jay saw no sound distinction between a citizen suing the forty thousand citizens of Philadelphia, which every one admitted, and the fifty thousand citizens of Delaware. It is true, however, that Hamilton, Marshall and Madison had not contemplated that a state could be sued by a citizen in the federal courts.

<sup>13</sup> The protest of several of the states against *Chisholm v. Georgia*, which led to the Eleventh Amendment, was induced not by any apprehension that the dignity of the State would be degraded by compulsory appearance before the federal court, but by the very practical fear that they might by such compulsory jurisdiction be compelled to pay their debts. See Marshall, C.J., in *Cohens v. Virginia* (1821 U. S.) 6 Wheat. 264, 406; Guthrie, *The Eleventh Amendment* (1908) 8 COL. L. REV. 183, 186; Fleischmann, *The Dishonesty of Sovereignities* (1910) N. Y. ST. B. A. REP. 234; Braxton (1907) VA. ST. B. A. REP. 172. See also Taft, C.J., dissenting opinion in *Sloan Shipyard Corp. v. U. S. Shipping Board* (1922) 258 U. S. 549, 573, to the effect that the prolonged delay of Congress in providing for the settlement of the French Spoliation claims "put in the hearts of claimants a deep sense of the injustice of Governments."

<sup>14</sup> *Hans v. Louisiana* (1889) 134 U. S. 1, 10 Sup. Ct. 504; *Beers v. Arkansas* (1857 U. S.) 20 Howard 527, 529; *Smith v. Reeves* (1900) 178 U. S. 436, 20 Sup. Ct. 919. *Barrett v. State* (1920) 220 N. Y. 423, 116 N. E. 99.

<sup>15</sup> *Chapman v. State* (1894) 104 Calif. 690, 38 Pac. 457; *Carr v. State* (1891) 127 Ind. 204, 26 N. E. 778; *Danolds v. State* (1882) 89 N. Y. 36.

right has been deemed a proceeding not of grace but of right,<sup>16</sup> though in theory the *fiat* may be withheld at any time and is withheld in claims arising out of tort. Practice has, however, developed the rule of law that the petition of right lies to obtain from the Crown restitution of lands or goods, or if this is impossible, then money damages for wrongful detention, or damages for breach of contract, including goods supplied to the Crown or to the public service.<sup>17</sup> Curiously, it was not until 1874 that it was definitely established that damages could be recovered for breach of contract,<sup>18</sup> though it must be left to conjecture why breach of contract was less a "wrong" than an ordinary tort, or why the recovery not barred by the tort element involved in disseisin or wrongful detention of chattels, real or personal, should not logically be extended to include conversion and other torts against the subject.<sup>19</sup> In the United States, contract claims have been recoverable in the Court of Claims since 1855. In England, damages for torts were recoverable against the wrongdoing officer, who generally at least could not plead in defense either reasons of state or command of the Crown or King.<sup>20</sup> Even this limited protection to the citizen has now been much qualified by the growth of administrative justice with its discretionary acts which escape judicial review.<sup>21</sup> But an even greater injustice is done by reason of the maxim that the doctrine of *respondeat*

<sup>16</sup> As in the case of the extraordinary legal remedies, the discretion in granting the writ has by practice been hardened into rule. See cases in Holdsworth, *op. cit.*, 38 L. QUART. REV. 289 *et seq.* and Clode, *op. cit.* p. 64 *et seq.* *United States v. O'Keefe* (1870) 11 Wall. 178, 183; *United States v. Lee* (1883) 106 U. S. 196, 205. See *Baron de Bode v. The Queen* (1848) 13 Q. B. 364, 387. A practice has recently been begun of instituting an action for a declaration against Crown officers, instead of proceeding by petition of right. *Dyson v. Attorney-General* [1911] 1 K. B. 411; *China Mutual Steam Navigation Co. v. Maclay, Shipping Controller* [1918] 1 K. B. 33. The courts will doubtless place limitations upon this method of suing the Crown.

<sup>17</sup> See Cockburn, C.J., in *Feather v. The Queen* (1865 Q. B.) 6 B. & G. 257, 293. Instances of such claims will be found in 10 Hals. Laws Eng. 27. See also Chitty, *Prerogatives of the Crown*, *supra*, p. 340 *et seq.*, Clode, *op. cit.*, 64 *et seq.* The tort element in disseisin or the wrongful detention of chattels real or personal, seems to be outweighed by the fact that in such cases of wrongful deprivation of property by the King the petition of right historically lay. In such cases, the Court of Claims or the Supreme Court would not allow recovery. *Langford v. United States* (1879) 101 U. S. 341.

<sup>18</sup> *Thomas v. The Queen* (1874) L. R. 10 Q. B. 31, 36.

<sup>19</sup> Such an extension is strongly recommended by Dr. Holdsworth in 38 L. QUART. REV. 295.

<sup>20</sup> *Entick v. Carrington* (1765) 19 State Trials 1030, 1073. It is doubtful whether to-day a discretionary act, without malice, of a superior officer entails any liability. *Feather v. The Queen* (1865 Q. B.) 6 B. & G. 257, 297; *Raleigh v. Goschen* (1898) 1 Ch. 73. In the United States, see *Little v. Barreme* (1804, U. S.) 2 Cranch, 170; *Otis v. Bacon* (1813 U. S.) 7 Cranch, 589.

<sup>21</sup> *Tozer v. Child* (1857, Q. B.) 7 E. & B. 377; *People ex rel. Sheppard v. Illinois State Board of Dental Examiners* (1884) 110 Ill. 180.

*superior* has no application to the King or Crown—or, with us, the State—which in theory can neither do nor authorize a wrong, and that even a superior officer is not liable for the torts of his subordinates, unless he expressly commands the tort—not a common case.<sup>22</sup> Thus the individual's recourse is usually confined to a subordinate wrongdoer, upon whom the risks of accepting public office fall with unjust severity and with detriment to the public service. Small pay with large risks induces fear to enforce the law. A health officer, for example, who in good faith believes a horse to have glanders or anthrax and thereupon orders it shot may, on the verdict of a lay jury that he was mistaken, find himself subjected to heavy damages,<sup>23</sup> without support or sympathy from the Government, with the result that his successors or colleagues will probably decline thereafter to assume such risks and will permit the community at large to bear the risk and the danger. Nor, as already observed, is it any defense to the subordinate that he acted under orders of a superior, even the highest executive officer, if the order proves for any reason to have been illegal. This defective social engineering can only be rightly improved by placing the risk of honest official mistakes upon the community, where it properly belongs.<sup>24</sup>

<sup>22</sup> *Lane v. Cotton* (1701, K. B.) 1 Ld. R., 646. Such a rare case has occurred in the case of a Secretary of State, *Entick v. Carrington*, *supra*, and in the case of colonial governors, who were not, however, deemed to possess sovereign powers, but limited powers, any transgression of which made them liable in tort. See *Musgrave v. Pulido* (P. C. 1879) 5 A. C. 102 and the cases there discussed. If an act of state in the true sense, it of course escapes judicial control. Moore, *Acts of State* (1906) *passim*. For American cases of immunity of superior officers for tortious acts of subordinates see *Keenan v. Southworth* (1872) 110 Mass. 474, and *Robertson v. Sichel* (1886) 127 U. S. 507, 515, 8 Sup. Ct. 1286, and cases there cited. Story, *Agency* (8th ed.) sec. 319.

The curious view seems to prevail that it would be harmful to the State to apply the doctrine of *respondeat superior* to the injuries committed by its officers upon members of the public. So in *Russel v. Devon County* (1788) 2 T. R. 667 it was said "it is better for the individual to suffer than for the public to be inconvenienced"; and in *Robertson v. Sichel*, *supra*, quoting Story: "[The Government] does not guarantee to any person the fidelity of any of its officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments and difficulties, which would be subversive of the public interests." How crude a view of social policy is expressed in these opinions will become apparent when the principles, theory and practice of the countries of continental Europe in this respect are examined in subsequent articles, *infra*.

<sup>23</sup> *Miller v. Horton* (1891) 152 Mass. 540, 26 N. E. 100; *Lowe v. Conroy* (1904) 120 Wis. 151, 97 N. W. 942. Other courts have gone to the other extreme and permitted the individual to bear his loss, if the officer acted in good faith. See *Raymond v. Fish* (1883) 51 Conn. 80; *Valentine v. City of Englewood* (1908) 76 N. J. L. 509, 71 Atl. 344, and COMMENTS (1909) 18 YALE LAW JOURNAL, 417.

<sup>24</sup> In a number of jurisdictions, like New York, the Board of Health, appearing on behalf of the city, or the city itself, is made liable for destruction of



Here we cannot leave out of account the fact that two states of this country, at least, have evidenced a high sense of social responsibility and individual justice by making the state pecuniarily responsible, up to a limited sum, to the victims of errors in the administration of criminal justice. Persons erroneously convicted of crime in California and Wisconsin may, upon proof of the mistake, obtain compensation from the state up to \$5,000, on the theory that the state, in the pursuit of crime, a public function, has erroneously taken the liberty of, and therefore imposed an unjust burden upon, a private individual in the public interest. For such mistakes, as is the case in most of the countries of Europe, the risk should be borne by the community and not by the unfortunate victim alone.<sup>25</sup>

#### STATUTORY CONSTRUCTION

So strongly entrenched in the judicial mind is the principle of immunity in tort that legislative consent to suit, though granted in the broadest language, has been deemed to exclude liability for tort. Thus, under a Washington statute providing that "any person . . . having any claim against the state of Washington shall have the right to begin an action against the state in the superior court," it was held that "claim" was synonymous with "cause of action," and as there never had been any cause of action arising out of the torts of officers, the statute was construed merely to provide a remedy against the state by suit in existing causes of action, but not to create any new grounds of liability, nor waive any former defense.<sup>26</sup> In New York the Court of Appeals has

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property by health officers acting under mistaken belief that they were destroying a nuisance, or who otherwise wrongfully destroyed private property. N. Y. Cons. Laws, 1907, sec. 101; New York City Charter, N. Y. Laws, 1901, ch. 466, sec. 1196; Freund, *Cases on Administrative Law* (1911) 358. The legislature frequently makes special appropriations to compensate the owners of diseased cattle destroyed in the public interest. See New York Times, Apr. 20, 1924. In England, where a ship is detained on suspicion of being unsafe or unseaworthy, and on later examination proves to be safe and seaworthy, the Government assumes the obligation to pay compensation to the owner. *Thompson v. Farrer* (1882) L. R. 9 Q. B. Div. 372, 384. This is so obviously sensible, that it is surprising how slow our states and cities are to appreciate its practical justice.

<sup>25</sup> Wis. Sts. 1921, sec. 3203a; Sts. Calif., 1913, ch. 165. Such statutes are in force in France, Germany, Norway, Sweden, Denmark, Austria, Spain, Portugal and several cantons of Switzerland. The system differs somewhat from country to country. See Senate Doc. 974, 62d Cong. 3d sess., and Borchard, "*State Indemnity for Errors of Criminal Justice*" (1913) 3 Jour. Crim. Law 684.

<sup>26</sup> *Riddoch v. State* (1912) 68 Wash. 329, 123 Pac. 450 (injury through defective railing in State armory, though leased for profit. See criticism in (1912) 74 CENT. L. JOUR., 431. *Green v. State* (1887) 73 Calif. 29, 11 Pac. 602, 14 Pac. 610; *Billings v. State* (1902) 27 Wash. 288, 67 Pac. 583; *Murdock Parlor Grate Co. v. Commonwealth* (1890) 152 Mass. 28, 24 N. E. 854; *Houston v. State* (1898) 98 Wis. 481, 74 N. W. 111; *Davis v. State* (1917) 30 Idaho, 137, 163 Pac. 373. See Ann. Cas. 1913 E, 1041, note, and 13 A. L. R. 1276, note; *Burroughs v.*

gone even further. By section 264 of the Code of Civil Procedure<sup>27</sup> the Court of Claims has jurisdiction "to hear and determine a private claim against the state, including a claim of an executor or administrator of a decedent who left him or her surviving a husband, wife or next of kin, for damages for a wrongful act, neglect or default, on the part of the state by which the decedent's death was caused . . . and the state hereby consents, in all such claims, to have its liability determined." Several courts had held that this statute expressly permitted liability for a "wrongful act, neglect or default" of an agent or officer of the State to be charged against the State. Not so the Court of Appeals. While admitting that this statute conferred "jurisdiction of the broadest character," Justice McLaughlin, speaking for the Court,<sup>28</sup> said that though the state "must be treated as having waived its immunity against actions as to all private claims," still, by waiving its immunity from action it did not thereby concede liability for the torts of its officers. "Immunity from action is one thing. Immunity from liability for the torts of its officers and agents is another."<sup>29</sup> The Illinois Court of Claims Act of June 25, 1917 empowers that Court "to hear and determine all claims and demands, legal and equitable, *ex contractu* and *ex delicto* which the State, as a sovereign Commonwealth, should, in equity and good conscience, discharge and pay." This provision was likewise held not to enlarge the liability of the State, but "simply provides a remedy by which claims may be heard, and this Court has no power to make an award in any case unless the facts show a legal or equitable claim against the State."<sup>30</sup> While torts of officers have not

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*Commonwealth* (1916) 224 Mass. 28, 112 N. E. 491. See also *United States v. Irwin* (1887) 127 U. S. 125, 8 Sup. Ct. 1033, and *United States v. Cumming* (1889) 130 U. S. 452, 9 Sup. Ct. 583, where the same narrow construction was given to a Congressional waiver of the immunity from suit. Nor was any different rule applied where the statute provided that "actions may be instituted against the state under the same rules and regulations that govern actions between private persons." *Clark v. State* (1869, Tenn.) 7 Cald. 306; *State v. Hill* (1876) 54 Ala. 67 (railroad operated by State).

<sup>27</sup> Now sec. 12 of the Court of Claims Act, as amended by N. Y. Laws, 1920, ch. 482.

<sup>28</sup> *Smith v. State of New York* (1920) 227 N. Y. 405, 409, 125 N. E. 841, 842. Hogan and Crane, J.J., dissented. Neither Cardozo, J., nor Pound, J., sat.

<sup>29</sup> One is reminded of the late Prof. Burdick's comment on another decision of the Court of Appeals, *Seligman v. Friedlander* (1910) 199 N. Y. 373, 92 N. E. 1047, in holding that "jointly and severally" in the Partnership Law, meant only "jointly." "Undoubtedly, section six of the Partnership Act must now be accepted by litigants in this State to mean not what it says, but what the learned Court of Appeals says that it says. For that court possesses all the authority over the meaning of words which Humpty Dumpty claimed for himself in Alice Through the Looking-Glass. 'When I use a word,' said he, 'it means just what I choose it to mean—neither more nor less.'" *Joint and Several Liability of Partners* (1911) 11 COL. L. REV. 101-119.

<sup>30</sup> *Thompson v. State* (1921) 4 Ill. Ct. Cl. 26; *Schmitt v. St.*, 1 *ibid.* 76.

been held to create a legal or equitable claim, the Court has in a considerable number of cases recommended to the legislature an appropriation as a matter of "social justice."<sup>31</sup>

It will be apparent how deeply settled is the conviction that only by the most specific language will the legislature be able to impose upon the State liability in tort.<sup>32</sup> Indeed, when the California legislature made an appropriation to pay compensation to an individual injured by a tort of its prison officials, the statute was held unconstitutional as a "gift" to a private individual.<sup>33</sup> So where the use and occupation of land for a lighthouse by governmental officials might have been regarded as a taking of land for public use under the constitution and clause one of the Tucker Act of 1887, the Supreme Court preferred to consider it a tort under clause four, with resulting immunity from suit.<sup>34</sup> A more liberal construction is given in Canada and Australia and in other British Colonies<sup>35</sup> to general statutes conferring jurisdiction over private claims against the state, but it is not at all certain that the United States Court of Claims would not have denied liability in tort even if the Tucker Act of 1887 had not expressly excluded from its jurisdiction

- new  
note

<sup>31</sup> *Watkins v. State* (1921) 4 Ill. Ct. Cl. 81; *Bailey v. St.*, 4 *ibid.* 191; *Abney v. St.* (1921) 4 *ibid.* 158; *McGhee v. State* (1921) 4 *ibid.* 144.

<sup>32</sup> In the Smith case, the claimant fell over a negligently placed wire strung on posts in a State Reservation at Niagara, from which some revenue was derived. The decision probably overrules some previous cases, in which recovery in tort had been allowed as if an individual or corporation had been the defendant; e. g., *Burke v. State of New York* (1909, N. Y. Ct. Cl.) 64 Misc. 558, where the injury arose out of the maintenance by the State of an inclined railway at Niagara Falls. In *Arnold v. State of New York* (1914, 3d Dept.) 148 N. Y. Supp. 479, 163 App. Div. 253, several claimants were killed or injured by the negligent operation of an automobile racing car at races conducted at a state fair. A writer in (1920) 5 CORN. L. QUART. 340, commenting on the Smith case and the conclusion that the Court of Claims had jurisdiction "to hear and determine" without imposing liability asks if it was designed to permit the claimant merely "to amuse himself." See also 5 CORN. L. QUART. 78-84. In California, a statute giving a privilege of bringing suit "on contract or for negligence" was construed not to authorize liability for torts of officers. *Denning v. State* (1899) 123 Calif. 316, 55 Pac. 1000.

<sup>33</sup> *Bourn v. Hart* (1892) 93 Calif. 321, 28 Pac. 95, though it was admitted that by a general law the state could assume liability for torts. See the language used by the court in *Brown v. State* (1923, 3d Dept.) 198 N. Y. Supp., 773, 206 App. Div. 634 (giving the Court jurisdiction over the claim of the executor of a juror in a state trial who had contracted a fatal illness through negligence of a court officer) to the effect that the legislature could not create a legal liability if the general rules of law recognized none. This is an exceptional view and is not generally entertained, certainly with respect to injuries admittedly torts.

<sup>34</sup> *Hill v. United States* (1893) 149 U. S. 593, 13 Sup. Ct. 1011.

<sup>35</sup> See *Farnell v. Bowman* (1887) L. R. 12 A. C. 643 (New South Wales statute); *Attorney General v. Wemyss* (1888) L. R. 13 A. C. 192 (Straights Settlements). Negligence on public works in Canada, sec. 20 of Exchequer Court Act. *Larose v. Rex* (1901) 31 Can. Sup. Ct. 206 and Audette, *Practice of the Exchequer Court of Canada* (2d ed. 1909) 104, 115. See also *infra*.

claims "sounding in tort." Special statutes have occasionally been construed to admit the State's liability for torts of its agents or officers.<sup>36</sup> The distinction between governmental and corporate functions, though not logically applicable to activities of the State, at least according to the Anglo-American theory, has nevertheless been occasionally invoked by the courts to deny liability for the torts of particular officers engaged in what the court called governmental functions.<sup>37</sup> Constitutional provisions in four states prohibit any suits against the State<sup>38</sup> though this does not prevent the legislature from appointing a Board of Claims to pass upon claims, with recommendations to the legislature. In some twenty states<sup>39</sup> suits against the State are constitutionally authorized, but with possibly two exceptions these provisions are not self-executing,<sup>40</sup> and in only a few of the states has the necessary legislation been passed. In most cases, the determination of the Board of Claims is

<sup>36</sup> See *Sandel v. State* (1922) 115 S. C. 168, 104 S. E. 567, 119 S. E. 776; (1924) 33 YALE LAW JOURNAL, 432; (1924) 9 CORN. L. QUART. 355 (death caused by impure vaccine furnished by the State). The Court rejected the argument that the State in furnishing vaccine was a charitable or eleemosynary institution and exempt. See the dissenting opinion, 119 S. E. 788. But see *Appelbacher v. State* (1915) 160 Wis. 565, 152 N. W. 144. The New York Canal Acts provided for liability for negligence. *Sipple v. State* (1885) 99 N. Y. 284, 1 N. E. 892 and 13 A. L. R. 1281. See also cases arising out of negligence in operating canals in Illinois. *Holmes v. State* (1905) 1 Ill. Ct. Cl. 324. See also special statute in *Lorich v. State* (1920) 184 N. Y. Supp. 818.

<sup>37</sup> *Green v. New York* (1919, N. Y. S. C.) 107 Misc. 557 (collision with automobile, driven by chauffeur employed by Cornell University); *McAuliffe v. New York* (1919, N. Y. S. C.) 107 Misc. 553, 176 N. Y. Supp. 679 (negligence of state physician in vaccinating a militiaman); *Schwab v. State* (1921) 4 Ill. Ct. Cl. 77 (conducting State Hospital for the Insane); *Ryan v. State* (1921) 4 *ibid.* 57 (Joliet Prison); *Green v. State* (1921) 4 *ibid.* 9 (a public park).

<sup>38</sup> Alabama, Arkansas, Illinois, West Virginia. See references to constitutional provisions in *Index Digest of State Constitutions*, Legislative Drafting Research Fund (1915) 1360. In Illinois, a Board called Court of Claims was established in 1917; its function is advisory to the legislature. For the history of relief against the State in Illinois, see Bulletin 10, Constitutional Convention of Illinois, 1920, compiled by Legislative Reference Bureau, Springfield, Ill., p. 864. See *Alabama Industrial School v. Addler* (1905) 144 Ala. 555, 42 So. 116.

<sup>39</sup> These states are Arizona, California, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington, Wisconsin, Wyoming. See references to constitutional provisions in *Index Digest of State Constitutions*, *supra* note 38, 1360-1361. Arizona and California permit by statute suits for negligence, but the few cases decided deny liability on this ground. In most of the states that permit suit, it is either expressly limited to contracts, or it is left in broad terms which the courts have usually construed to exclude liability in tort. In the absence of constitutional provision for or against, the legislature undoubtedly has the power to make the State liable for the torts of its officers.

<sup>40</sup> *Randabaugh v. State* (1917) 96 Ohio St. 513, 118 N. E. 102, appeal dismissed (1918) 248 U. S. 32, 39 Sup. Ct. 16.

recommendatory only, requiring a legislative appropriation. This is true also where the determination is final, as in the case of the United States Court of Claims, but no one could seriously object to the inadequacy of such form of declaratory judgment, which indeed in practice has rarely, if ever, been refused satisfaction by the legislature. Certainly, the judicial method of determining the validity of claims is far preferable to the customary appeal to the legislature, with its political implications. In this respect, we have long lagged behind England where the sovereign immunity from suit was at least accompanied by legal machinery, by petition of right, for trying judicially certain types of cases.

#### WHEN SUIT AGAINST OFFICER IS CONSIDERED SUIT AGAINST STATE

In the light of the limited jurisdiction of the courts over claims against the State and the wider range of liability of officers, especially in respect of torts, it becomes important to determine when a suit against an officer is in reality a suit against the state and within its protective immunity. Inasmuch as the state can act only through officers, it would always be possible to implead the state in the guise of its officer were the courts not careful to maintain proper criteria between personal acts and acts in the name of the state. This the courts have attempted to do, but a survey of their effort in this direction is hardly convincing of the existence or soundness of the alleged principles they assume to adopt. In a general way, the distinctions sought to be maintained in England between acts of government and administrative or corporate acts, which lie at the basis of the rules of public liability in the countries of continental Europe and in our law of municipal corporations, respond more nearly, though by no means satisfactorily, to logical tests than do the distinctions made in American law. Thus, in England, an effort is made to find whether the officer or corporate body created for the accomplishment of a public service is an emanation of the Crown in its governmental capacity or a subordinate officer, board, or body carrying on ministerial or "corporate" work as a substitute for private enterprise. The distinctions made are not satisfactory, for into the determination enter considerations of the historical origin, private or public, of the board or body or function, and its operation in the local as opposed to the national interest and the nature of its control;<sup>41</sup> but even these tests are inadequate, for at one time education,<sup>42</sup> sanitation,<sup>43</sup> rail-

<sup>41</sup> See Moore, *Liability for Acts of Public Servants* (1907) 23 L. QUART. REV. 12 and the brilliant article of Mr. Laski, *The Responsibility of the State in England* (1919) 32 HARV. L. REV. 447.

<sup>42</sup> *Regina v. Temple* (1852, Q. B.) 2 E. & B. 160 (liable for taxes); *County Council of Durham v. Assessment Committee* [1891] 1 Q. B. 330 (taxes). The local education authorities in England are now liable for the torts of their officers and agents. *Morris v. Carnarvon County Council* [1910] 1 K. B. 840; *Smith v. Martin* [1911] 2 K. B. 775. Thus, England goes much further than the

way<sup>44</sup> and telegraph<sup>45</sup> service were under private control and yet their present governmental directors are covered by the immunity and constructive infallibility of the Crown. On the other hand, the duty of lighting and buoying the coasts of England,<sup>46</sup> or managing the docks and harbors,<sup>47</sup> is probably a governmental function, yet the boards to whom by statute those duties have been delegated are made liable for the

United States in assuming governmental responsibility for torts of employees, e. g. teachers.

<sup>44</sup> *Sanitary Commissioners of Gibraltar v. Orfila* (1890, P. C.) 15 A. C. 400 (under the statute creating the health board, it was thought that it was not intended to hold them liable for the collapse, due to defective construction, of an overhanging road built by them).

<sup>45</sup> *Regina v. McLeod* (1883) 8 Can. Sup. Ct. 1; *Reg. v. Macfarlane* (1882) 7 Can. Sup. Ct. 216 (Canadian Government railways operated by the Minister of Railways, not liable as common carriers). See criticism of these cases in a note by Charles Morse in (1917) 53 CAN. L. JOUR. 281-289, and in 35 Dom. L. R. 285. Since 1887 the Crown in Canada subjects itself to the jurisdiction of the Exchequer Court on "every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment." *Letourneau v. The Queen* (1903) 33 Sup. Ct. 339; *Miller v. The Grand Trunk Railway Co.* [1906] A. C. 187. *Gilchrist v. The Queen* (1891 Can.) 2 Exch. 300; *Anderson v. Rex* (1920) 20 *ibid.* 22; *Leclerc v. Rex* (1920) 20 *ibid.* 236; *Windsor & Annapolis R. Co. v. Regina* (1886) 11 A. C. 607 and Audette, *The practice of the Exchequer Court of Canada* (2d ed. 1909) 115 *et seq.* Where a separate board was organized to operate the railways in Victoria, liability was imposed. *Sweeney v. Board of Land and Works* (1878) 4 Vic. L. R. 440. In New South Wales, the Railway Commissioners are sued, but are indemnified by the State. *Saunders v. The Railway Commissioners* (1920) 21 N. S. W. 7. In the British Colonies, owing to the fact that many enterprises had to be undertaken and operated by the Government, it is quite common to permit the Petition of Right to cover injuries to the subject sounding in tort. See Sir Barnes Peacock in *Farnell v. Bowman* (1887) 12 A. C. 643, 649.

<sup>46</sup> *Bainbridge v. Postmaster General* [1906] 1 K. B. 178. Probably in no country of Western Europe to-day would the State be considered not liable for torts of its officers and employees in the health, railroad and telegraph services. See *infra*. The immunity of the postmaster for torts of his subordinates was first declared in *Lane v. Cotton* (1701, K. B.) 1 Ld. R. (Holt, C.J., dissenting) partly on the ground that the function was governmental and that the subordinate, though appointed by the defendant Postmaster, was himself an officer of the Crown, and that the doctrine of *respondeat superior* was inapplicable. This was followed in *Whitfield v. Le Despencer* (1778, K. B.) 2 Cowp. 754. This doctrine has been accepted in the United States, beginning with *Keenan v. Southworth* (1872) 110 Mass. 474, but the immunity of the postmaster is limited to torts committed by subordinates who are themselves public officers appointed by the Government, and not to such persons as may be his personal employees and receive compensation from him alone. *Raisler v. Oliver* (1892) 97 Ala. 710, 12 So. 238. The failure to maintain this distinction has resulted in much confusion in our courts. See the article of Emlin McClain, *Liability in Tort of Carriers of the Mail* (1914) 14 COL. L. REV. 632.

<sup>47</sup> *Gilbert v. Corporation of Trinity House* (1886) L. R. 17 Q. B. Div. 795.

<sup>48</sup> *Mersey Docks v. Gibbs* (1866) L. R. 1 H. L. 93.

torts of their employees. Yet separate incorporation does not afford a genuine test, for we find that the Secretary of State for India in Council, the Postmaster-General, the Commissioners of Public Works and Buildings, the Guardians of the Poor, though organized as corporations, are nevertheless Government agents and protected by its immunities.<sup>48</sup> Indeed, the same official, like the Secretary of State for India, may for purposes of government, e. g., the distribution of war booty, escape liability<sup>49</sup> and yet, as successor to the corporate functions of the East India Company he may be subject to liability.<sup>50</sup> Again, our confusion is increased by the knowledge that when Parliament incorporates these bodies for the performance of public functions, such as harbor or sanitary commissioners, it may decide whether or not it will extend to them the shield of the Crown or subject them to the duties and liabilities of private corporations, so that in each case an examination of the organizing charter or statute may become necessary.<sup>51</sup> It is not less disconcerting to find that for some purposes, such as immunity from taxes or costs, a particular board or body enjoys sovereign privileges and exemptions, whereas in the matter of liability for breach of contract or tort it does not.<sup>52</sup> Nor does it restore our confidence to find that, as in *Graham v. Public Works Commissioners*,<sup>53</sup> the question of their suability for breach of contract turns upon whether they made the contract for themselves or on behalf of the Crown; and after finding that the erection of a public post office was contracted for by the board "for themselves",

<sup>48</sup> *Kinloch v. Secretary of State for India* (1880) 15 Ch. Div. 1 (though he may be the person in whose name the government of India sues and is sued); *Roper v. Public Works Commissioners* [1915] 1 K. B. 45, 52 (no liability in tort); *Bainbridge v. Postmaster General*, *supra* note 45, not liable in tort. *Dunbar v. The Guardians of the Poor of the Ardee Union* [1897, C. A.] 2 Ir. Rep. 76, 88 (poor law guardians not liable in tort). FitzGibbon, L.J., thought, logically, that the immunity in tort should extend not merely to "emanations from the Crown" or the great officers of State, but to "every public department." So individuals sued in their official capacity may be protected by the shield of the Crown. *Raleigh v. Goschen* [1898] 1 Ch. 73 (First Lord and Lords Commissioners of the Admiralty).

<sup>49</sup> *Kinloch v. Secretary of State for India*, *supra* note 48.

<sup>50</sup> *P. & O. Steam Navigation Co. v. Secretary of State for India* (1861) 5 Bom. H. C. R. Appendix I; see also *Jekanger M. Cursetji v. Secretary of State for India* (1902) L. R. Bom. 189, 197, and Ilbert, *The Government of India* (3d ed. 1915) 170.

<sup>51</sup> *Mersey Docks v. Gibbs*, *supra* note 47; *Sanitary Commissioners of Gibraltar v. Orfila*, *supra* note 43; *Dunbar v. The Guardians of the Poor*, *supra* note 48.

<sup>52</sup> *Regina v. McCann* (1868, Exch.) L. R. 3 Q. B. 677 (Commissioners of Works and Buildings) taxes; *Re Woods Estate* (1886) 31 Ch. Div. 607, 621 (costs); *Graham v. Public Works Commissioners* [1901] 2 K. B. 781 (damages for breach of contract allowed; declaratory judgment). England has also developed a desirable practice of permitting the suit in tort to proceed against the officer, and then paying the judgment out of the Treasury. *Dixon v. Farrer* (1886) L. R. 17 Q. B. Div. 658 (detention of ship erroneously thought to be unseaworthy).

<sup>53</sup> *Supra*, note 52.

making them suable,—though we are told that a public officer cannot be made liable on contracts made by him for the public service<sup>54</sup>—nevertheless no execution can issue because their property is Crown property. Nor are our difficulties relieved by the distinctions sought to be made in England and in some cases in this country between the misfeasance and nonfeasance of officers, the former carrying liability, the latter immunity.<sup>55</sup>

The effort of the British courts to reconcile the immunity of the Crown from suit in tort with the liability of public officers resulted in the attempt to find a line of division between acts of the Crown or government, which covered with the mantle of immunity the officers through whom such acts must perforce be accomplished, and tortious non-governmental or "corporate" acts of the individual officer or body, which were not protected by the shield of the Crown. We have seen that this separation, involving also a denial of the principle of *respondeat superior* in official "governmental" relations, and other manifestations of solicitude for superior officers, has resulted practically in limiting the recourse of the injured citizen, even where he could sue, to an action against subordinate and usually irresponsible minor officials, which in practical effect was not far removed from a denial of relief of any kind.<sup>56</sup>

In the United States, with unimportant and disputed exceptions,<sup>57</sup> even so much of a scientific effort as is involved in separating "governmental" from "corporate" acts cannot be discovered in the attempt to reconcile State immunity with official responsibility, though such an effort has been made in determining the liability of municipal corporations and occasionally, but without substantial merit, of corporations or boards organized to perform particular state functions. In State relations, the effort to apply the inhibitions of the Eleventh Amendment in the federal courts has resulted in a haphazard application of tests to determine merely when a suit directed against an officer or corporate body existing by state authority is in reality a suit against the State. That effort has been much complicated by the necessity of reconciling the immunity from suit secured by the Eleventh Amendment with the constitutional prohibitions upon the states against impairing the obli-

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<sup>54</sup> *Dunn v. Macdonald* [1897] 1 Q. B. 401, 555. *Palmer v. Hutchinson* (1881, H. L.) 6 A. C. 619; *Hodgson v. Dexter* (1803, U. S.) 1 Cranch, 345.

<sup>55</sup> These distinctions will be considered when we deal with the torts of municipal corporations.

<sup>56</sup> The officer in England enjoys further privileges, e. g. the six-months' statute of limitations of the Public Authorities Protection Act, 1893, exemption on execution of salary and pension, etc. See *The Danube II* [1921] Prob. 183. Emden, *The Civil Servant in the Law and the Constitution* (1923) 34 *et seq.* and Emden, *The Scope of the Public Authorities Protection Act 1893* (1923) 39 L. QUART. REV. 341. Chartres, *The Public Authorities Protection Act* (1912) 1893.

<sup>57</sup> *Supra*, note 37.



gation of contract and against depriving any person of life, liberty or property without due process of law under the Fourteenth Amendment.

The construction of the Eleventh Amendment first came before the Supreme Court in *Osborn v. The United States Bank*,<sup>58</sup> when Marshall decided that the Eleventh Amendment was inapplicable unless the State was a party to the record. That construction would have nullified the Amendment and it had to be rejected, as it was in *Poindexter v. Greenhow*,<sup>59</sup> where the rule was adopted that the question as to whether the state is being sued is to be determined, not by the nominal parties to the record, but by consideration of the effect upon the state of the judgment or decree to be rendered, and of the real repository of the adverse interest, the state or officer personally, against whom the decree would effectively operate.<sup>60</sup> If the state is the real party in interest or an indispensable party to enable the court to grant the relief sought, though an officer is the defendant, the suit cannot lie, except, as we shall see, to restrain an officer from seeking to enforce an unconstitutional state law. Thus, if the object of the suit against an officer is to compel a specific performance of the state's contract,<sup>61</sup> or to obtain possession of property of which the state claims title and possession,<sup>62</sup> or to compel

<sup>58</sup> (1824, U. S.) 9 Wheat. 739.

<sup>59</sup> (1884) 114 U. S. 270, 286, 5 Sup. Ct. 903.

<sup>60</sup> *In re Ayers* (1887) 123 U. S. 443, 487, 8 Sup. Ct. 164. See the latest expression of the Supreme Court's view in this regard in *In re State of New York* (1921) 256 U. S. 490, 41 Sup. Ct. 588, 590. Suits against high officials, acting in their official capacity as representatives of the State, are thus often held to be merely suits against the State: *Georgia v. Sundry African Slaves* (1828, U. S.) 1 Pet. 110; *Kentucky v. Dennison* (1860, U. S.) 24 How. 66 (Governor of a state). But see *Davis v. Gray* (1872, U. S.) 16 Wall. 203, questioned in *Cunningham v. Macon* (1883) 109 U. S. 446, 3 Sup. Ct. 292. *Hodgson v. Dexter* (1803, U. S.) 1 Cranch, 345, 363 (Secretary of War). As to state treasurer, etc., see notes 63 and 64. See in general, 44 L. R. A. 189, note, and 108 Amer. St. Rep. 830, note.

<sup>61</sup> *Hagood v. Southern* (1886) 117 U. S. 52, 6 Sup. Ct. 608; *North Carolina v. Temple* (1890) 134 U. S. 22, 10 Sup. Ct. 509; *Louisiana v. Jumel* (1882) 107 U. S. 711, 2 Sup. Ct. 128; *In re Ayers*, *supra*; *Murray v. Wilson Distilling Co.* (1913) 213 U. S. 151, 29 Sup. Ct. 458; *Miller v. State Board* (1899) 46 W. Va. 192, 32 S. E. 1007. The distinction between these cases and those in which the constitutional rights of citizens under contracts with states are protected in equity, as in *Allen v. Baltimore and Ohio R. R.* (1884) 114 U. S. 311, 316, 5 Sup. Ct. 925, 962, has been explained on the theory that the former were political acts of the state and the latter civil or judicial. See Pilling, *The Eleventh Amendment* (1917) 15 MICH. L. REV. 468, 475. This explanation is not very helpful in resolving doubts and classifying cases.

<sup>62</sup> *Cunningham v. Macon*, *etc.* (1883) 109 U. S. 446, 3 Sup. Ct. 292; *Christian v. N. C. Railroad* (1890) 133 U. S. 233, 10 Sup. Ct. 260; *Stanley v. Schwalby* (1896) 162 U. S. 255, 16 Sup. Ct. 754. This was held to apply to libels *in rem* in admiralty, where the vessel libelled was, when the injury was done, under charter to the state, and in charge of its superintendent of public works against whom an action in personam was joined. *In re State of New York* (1921) 256

an officer to pay money out of the state treasury,<sup>63</sup> or to prevent the state from using its own property or property which it claims as its own,<sup>64</sup> the federal courts decline jurisdiction. But when the State comes into the market place and engages in business, it might be supposed that it rendered itself subject to law and the usual legal relations. Yet while the Supreme Court has recognized this distinction with respect to corporations chartered and partly owned by the State,<sup>65</sup> and also in permitting the Federal Government to tax the liquor business conducted by the State of South Carolina,<sup>66</sup> it declined to subject the State liquidators of that liquor business to suit without the State's consent.<sup>67</sup> The North Dakota Supreme Court had greater temerity in subjecting that State to suit in respect of the business enterprises conducted by that state,<sup>68</sup> even in the absence of an express statute, but this rather courageous judicial legislation has not escaped academic condemnation.<sup>69</sup>

U. S. 490, 41 Sup. 588, the doctrine of State immunity overriding a settled rule of admiralty. In *Workman v. New York City* (1900) 179 U. S. 552, 21 Sup. Ct. 212, almost an identical suit against the city of New York was allowed.

<sup>63</sup> *Louisiana v. Jumel*, *supra* note 61; *Smith v. Reeves* (1899) 178 U. S. 436, 20 Sup. Ct. 919. See also *Flagg v. Bradford* (1902) 181 Mass. 315, 63 N. E. 898. Recently an action against the State Banking Board and the Banking Commissioner of Oklahoma to compel payments from the Depositors' Guaranty Fund, established by the legislature, was held to be a suit against the State. *Lankford v. Platte Iron Works Co.* (1915) 235 U. S. 461, 35 Sup. Ct. 173; (1916) 64 U. P. A. L. REV. 320 (four justices dissented). But see *Allen, Bank Commissioner v. United States* (1923, C. C. A. 1st) 285 Fed. 678, 682, where it was held that a suit against a bank commissioner to establish a claim against an insolvent bank, of which he had taken charge, was not a suit against the state. If the money had not yet gotten into the State Treasury, suit against the State Treasurer for illegally retained funds would lie. *United States v. Peters* (1809, U. S.) 5 Cranch, 115.

<sup>64</sup> *Belknap v. Schild* (1895) 161 U. S. 10, 16 Sup. Ct. 443; *International Postal Supply Co. v. Bruce* (1904) 194 U. S. 601, 24 Sup. Ct. 820. In *Oregon v. Hitchcock* (1906) 202 U. S. 60, 26 Sup. Ct. 568, the object unsuccessfully sought was to restrain the Secretary of the Interior from patenting to individuals certain public lands, the plaintiff state claiming title.

<sup>65</sup> *United States v. Planters' Bank of Georgia* (1824, U. S.) 9 Wheat. 904. *Briscoe v. Bank of Kentucky* (1837, U. S.) 11 Pet. 257. But see *infra*.

<sup>66</sup> *South Carolina v. United States* (1905) 199 U. S. 437, 26 Sup. Ct. 110.

<sup>67</sup> *Murray v. Wilson Distilling Co.* (1909) 213 U. S. 151, 29 Sup. Ct. 458. See (1908) 21 HARV. L. REV. 289 on the decision below, 164 Fed. 1, which the Supreme Court reversed.

<sup>68</sup> *Sargent County v. State* (1921, N. Dak.) 182 N. W. 270. That this would be the decision in the countries of western Europe, except England, on the ground that it involves acts of *gestion* (in France) or of the *fiscus* (in Germany) is hardly to be doubted. The increasing participation of government in business makes the question important; recognition of that fact accounts for the provisions in much of the modern legislation, as in fact in North Dakota (in certain respects), in the Federal Railroad Control Act of 1918 (United States Railroad Administration), and in the Merchant Marine Acts of 1916 and 1920 permitting the Government to be sued, in specified ways. See *Western & Atlantic R. R. v. Carlton* (1850) 28 Ga. 180 (railroad owned by State of Georgia). Yet in the

The Supreme Court has on numerous occasions enjoined or mandamus high officials of the state in the performance of acts which, violative of the private rights of citizens, were regarded as ministerial in character.<sup>70</sup> That many of the acts thus enjoined or mandamus are in reality state acts, for example, the compulsory levy of taxes to pay state bonds, is hardly to be doubted, but if the court finds that the duty is owed to the plaintiff and is sought to be evaded whether by authority of an invalid state law or otherwise, it has no hesitation in directing the state officer to perform his legal duty, though even in such cases an action for damages, at least against higher officials, will not be entertained.<sup>71</sup>

Not the least of the difficulties of reconciling the Eleventh with the Fourteenth Amendment and other constitutional inhibitions on the State has lain in the attempt to show that in enjoining or subjecting to other suit the State officer acting under a statute violating the constitutional rights of the citizen under the Fourteenth Amendment, the State itself was not being sued. The purported solution was furnished by the reasoning of Justice Matthews in *Poindexter v. Greenhow*,<sup>72</sup> in which he drew a distinction between the government and the State. The government, as the agent, can act validly only within the scope of its authority, the state and federal constitutions. When then it passes a statute, under which an officer purports to act, which in fact is in violation of a constitutional limitation, the government has exceeded its legal

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absence of statute, subjection of the state to suit without consent must be regarded as judicial legislation, and however commendable in result, challenges a deeply-rooted, though long unjustified doctrine of Anglo-American law. *Young v. Steamship Scotia* (1903, P. C.) 89 L. T. R. 374. It is the object of these articles to endeavor to bring about a repeal by legislation of the antiquated and unjust rule of immunity in tort cases.

<sup>69</sup> (1922) 35 HARV. L. REV. 335.

<sup>70</sup> *Kendall v. United States, ex rel. Stokes* (1838, U. S.) 12 Pet. 524. (Mandamus against Postmaster General.) *Board of Liquidation v. McComb* (1875) 92 U. S. 531. *Seibert v. Lewis* (1887) 122 U. S. 284, 7 Sup. Ct. 1190. *Graham v. Folsom* (1906) 200 U. S. 248, 26 Sup. Ct. 245. *Parish v. McVeagh* (1909) 214 U. S. 124, 29 Sup. Ct. 556 (mandamus) and *Houston v. Ormes* (1920) 252 U. S. 469, 40 Sup. Ct. 369 (in equity to establish attorney's lien on claim allowed by the Court of Claims) were suits against the Secretary of the Treasury, but instituted after Congress had made the necessary appropriation. Yet when the mandamus sought to compel the Treasurer to take money out of the State Treasury to pay certain coupons on bonds it was refused. *Louisiana v. Jumel* (1882) 107 U. S. 711, 2 Sup. Ct. 128.

<sup>71</sup> Compare *Kendall v. Stokes* (1838, U. S.) 12 Pet. 524 with *Stokes v. Kendall* (1845), U. S.) 3 How. 87, where the same act was held sufficiently ministerial to warrant mandamus, but sufficiently discretionary to deny liability for damages. See 2 Goodnow, *op. cit.*, 165 et seq.

<sup>72</sup> (1884) 114 U. S. 270, 5 Sup. Ct. 903. See this *ultra vires* argument, as developed in state courts, in *Clark v. State* (1869, Tenn.) 7 Cald. 306, 317, and *Louisville & Nashville Railroad Co. v. Burr* (1917) 63 Fla. 491, 58 So. 543.

powers and the officer is not protected by the statute against judicial control by suit. The illegal act is not then the act of the State, but the illegal personal act of the officer "who falsely speaks and acts in its name." Whether or not it required this circuitous and perhaps specious reasoning to enable the Supreme Court to protect the constitutional rights of the individual against impairment by the State, it is nevertheless a fact that the Supreme Court has never hesitated to enjoin or otherwise control the instrument or agent of the State acting under an unconstitutional statute or, of course, acting unconstitutionally in the execution of a valid statute.<sup>73</sup>

It may be well to recall here that the same argument of *ultra vires* might, if admitted as applicable to the relation between the state and its officer committing an illegal act, serve automatically to absolve the state from all liability, for it is doubtless true that the state, even admitting the power, never, or very rarely, authorizes a tort.<sup>74</sup> Fortunately, this plea of *ultra vires* has not been admitted in this relation, any more than it has in the case of corporations, including municipal corporations, generally, yet it has troubled the theory of state responsibility not a little. Its effect is practically attained, of course, through the antiquated doctrine of State immunity and infallibility and the inapplicability to the State of the usual rules of agency,<sup>75</sup> leaving the officer, and then only the most subordinate as a rule, to bear personally the consequences of his mistake, negligence or misfeasance in the performance of official duties, and leaving to the individual merely this often doubtful remedy. Once regard the officer as the embodiment or organ of the State, then all remedy for negligence disappears. The State's immunity from suit covers the officer. While the remedy against the officer is generally effective where its purpose is to recover specific property unlawfully

<sup>73</sup> *Pennoyer v. McConaughy* (1891) 140 U. S. 1, 11 Sup. Ct. 699; *Reagan v. Farmers' Loan and Trust Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047. *In re Young* (1908) 209 U. S. 123, 28 Sup. Ct. 441. See (1908) 21 HARV. L. REV. 527. *Greene, Auditor v. Louisville & Interurban Railway Co.* (1917) 244 U. S. 499, 37 Sup. Ct. 673. In the Reagan case, the action, rather than the statute, was unconstitutional. The same principle applies to state boards acting illegally. *U. S. v. McCallum et al., State Board of Harbor Commissioners of Calif.* (1922, N. D. Cal.) 281 Fed. 834. See also the cases listed in 25 R. C. L. 415, note 20. Justice McReynolds believes that the attempt to enjoin the enforcement of a criminal statute of a state is a suit against the state, and protests against refining away, as he calls it, the provisions of the Eleventh Amendment. See his dissenting opinion in *Truax v. Raich* (1915) 239 U. S. 33, 36 Sup. Ct. 7.

<sup>74</sup> In *Feather v. Regina* (1865, K. B.) 6 B. & S. 257, 295, 122 Eng. Rep. 1191, 1205, Cockburn, C.J., indeed said: "From the maxim that the King can do no wrong, it follows, as a necessary consequence, that the King cannot authorize a wrong."

<sup>75</sup> Story, *Agency*, 9th ed., sec. 319; *Gibbons v. U. S.* (1868, U. S.) 8 Wall. 269, 274; *Clodfelter v. State* (1882) 86 N. C. 51; *State v. Hill* (1876) 54 Ala. 67; *Langford v. U. S.* (1879) 101 U. S. 341; *Billings v. State* (1902) 27 Wash. 288, 67 Pac. 583.

withheld by the officer and not claimed by the State,<sup>76</sup> and where the action of the officer can be controlled by injunction, mandamus or other coercive relief, as in the cases already mentioned, its effectiveness in an action for damages is, of course, limited to the pecuniary responsibility of the wrong-doing official, who is not, except in rare cases, protected by an order, if actually illegal, emanating from a superior executive officer.<sup>77</sup> The practical requirement, thus enforced, that the subordinate officer assume the risk of the constitutionality, legality and correctness of the orders of his superior officers alone demonstrates the injustice and inequity of the existing rule as to all parties concerned—the subordinate officer, the victim of the injury, and the State or public which employs all officers. It is flagrantly defective social engineering.

The Supreme Court no longer seems to regard as important the point once raised that if the act sought to be enjoined is not the state's act, then the Fourteenth Amendment and the due process clause is not involved, whereas if it is the state's act, then the Eleventh Amendment interposes to deny jurisdiction.<sup>78</sup> This point, raised in the *Ayres* case, with respect to the effect of the Eleventh Amendment on the article prohibiting the states from passing any law impairing the obligation of contracts, has served to draw a distinction between the mere breach of a contract, upon which suit will not be entertained against the State, and the effect of the inhibited law, which will be treated as null and void.<sup>79</sup> The effort to reconcile the doctrine of such cases as *Reagan v. Farmers Loan & Trust Co.*<sup>80</sup> and *ex parte Young*,<sup>81</sup> in which injunctions were obtained against state attorneys-general from enforcing unconstitutional rate statutes, with such cases as *Fitts v. McGhee*,<sup>82</sup> in which

<sup>76</sup> *U. S. v. Lee* (1882) 106 U. S. 196, 1 Sup. Ct. 240; *Tindal v. Wesley* (1897) 167 U. S. 204, 211, 221, 17 Sup. Ct. 770, 773, 777; *Scranton v. Wheeler* (1900) 179 U. S. 141, 152, 21 Sup. Ct. 48, 52. So a suit against the Secretary of War to enjoin the removal of a bridge, as it involves the protection of property rights, was regarded as not a suit against the United States. *Philadelphia Co. v. Stimson* (1912) 223 U. S. 605, 32 Sup. Ct. 340; *Delaware R. R. Co. v. Weeks* (1923, D. Del.) 293 Fed. 114.

<sup>77</sup> *Bates v. Clark* (1877) 95 U. S. 204, 209; *Scott v. Donald* (1896) 165 U. S. 58, 67, 17 Sup. Ct. 265, 266; *Belknap v. Schild* (1896) 161 U. S. 10, 18, 26, 16 Sup. Ct. 443, 445, 448, 449. *Johnson v. Lankford* (1918) 245 U. S. 541, 546, 38 Sup. Ct. 203, (1918) 31 HARV. L. REV. 1036. See also *Elmore v. Fields* (1907) 153 Ala. 345, 45 So. 66; *Burroughs v. Common.* (1916) 224 Mass. 28, 112 N. E. 491, Ann. Cas. 1917 A 38; 25 R. C. L. 414.

<sup>78</sup> See Hadley, *The Eleventh Amendment* (1908) 66 CENT. L. JOUR., 71, 75.

<sup>79</sup> *In re Ayers* (1887) 123 U. S. 443, 8 Sup. Ct. 164; *Carter v. Greenhow* (1884) 114 U. S. 370, 17 Sup. Ct. 928; *Hays v. Port of Seattle* (1920) 251 U. S. 233, 40 Sup. Ct. 125. See note 61 *supra*, as to suggested distinction between political and judicial acts in connection with state contracts.

<sup>80</sup> (1894) 154 U. S. 362, 14 Sup. Ct. 1047.

<sup>81</sup> (1908) 209 U. S. 123, 28 Sup. Ct. 441.

<sup>82</sup> (1899) 172 U. S. 516, 19 Sup. Ct. 269.

an injunction against an attorney-general to prevent the execution of an act alleged to be unconstitutional, was denied, on the ground that in the former cases the officer sued was specially charged with enforcing the unconstitutional act, whereas in the latter he was not necessarily so charged but his name afforded the plaintiff merely a means for testing the constitutionality of the statute, seems hardly convincing, or successful. The alleged distinction had better be abandoned, as has the attempt, once made, to find that the pecuniary or proprietary interests of the state had to be involved in the forbidden suit and not the governmental.<sup>83</sup> It must be confessed that it is almost impossible to discover any guiding principle for determining when a suit against an officer is a suit against the State and most of those who have dealt with the subject have contented themselves with an enumeration of the cases, without for the most part any serious effort to educe an underlying principle or criticize inconsistencies.<sup>84</sup>

#### CORPORATIONS EXERCISING PUBLIC POWERS

Though an officer of the State carrying out his official duties as the agent of the State has on so many occasions been held to enjoy its immunity from suit, a somewhat different principle seems to prevail, at least in the federal courts, when the Government instead of confiding the performance of official duties to an individual or commission, organizes a corporation for this purpose, or purchases all or a part of the stock in such corporation.<sup>85</sup> The intermediate corporation, though engaged in the performance of the most "governmental" of functions,

<sup>83</sup> Compare *Reagan v. Farmers' Loan and Trust Co.*, *supra*, with *Missouri v. Illinois* (1901) 180 U. S. 208, 21 Sup. Ct. 331, and *Kansas v. Colorado* (1907) 206 U. S. 46, 27 Sup. Ct. 655. See also 2 Willoughby, *Constitutional Law* (1910) sec. 625.

<sup>84</sup> The more exhaustive discussions of this question will be found among the following: 2 Willoughby, *Constitutional Law*, ch. LIV; Singewald, *The Doctrine of Non-Suability of the State in the United States* (1910); Wintersteen, *The Eleventh Amendment and the Non-Suability of the State* (1891) 30 AM. L. REG. 1-15; Trieber, *Suability of States by Individuals in the Courts of the United States* (1907) 41 AM. L. REV. 845-869; Trickett, *Suits against States by Individuals in the Federal Courts* (1907) 41 AM. L. REV. 364-384; *The Eleventh Amendment*, three articles by Guthrie in (1908) 8 COL. L. REV. 183-207, by Braxton in the VA. B. A. REP. for 1907, 172-193 (mainly historical) and by Hadley (1908) 66 CENT. L. JOUR. 71-76. See note in (1907) 7 COL. L. REV. and extensive note to the case of *Sanders v. Saxton* (1905) 182 N. Y. 477, 75 N. E. 529, in 108 Am. St. Rep. 826, 830-844. See an extensive note in 44 L. R. A. (N. S.) 189-228.

<sup>85</sup> *Bank of United States v. Planters' Bank of Georgia* (1824, U. S.) 9 Wheat. 904, 907; *Bank of Kentucky v. Wister et al.* (1829, U. S.) 2 Pet. 318; *Briscoe v. Bank of Kentucky* (1837, U. S.) 11 Pet. 257; *Salas v. United States* (1916, C. C. A. 2d) 234 Fed. 842; *Panama Railroad Co. v. Curran* (1919, C. C. A. 5th) 256 Fed. 768. See also *Hall v. Wisconsin* (1880) 103 U. S. 5, 11 (contract by State with private individuals; State "regarded *pro hac vice* as a private person").

seems here, as occasionally in England,<sup>86</sup> to qualify the immutability of the principle of State immunity from suit. To effect such a vital difference by a mere change in the nature of the agent, individual or corporate, might lead one to question the unchallengeable soundness of the original theory of immunity. In the case of *Bank of United States v. Planters' Bank of Georgia*, Chief Justice Marshall explained this subjection of corporations to suit as follows:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted."<sup>87</sup>

Yet even this result has not commanded uniform support from the courts, for in the recent case of *Ballaine v. Alaska Northern Railway Co. (United States, intervener)*<sup>88</sup> the Circuit Court of Appeals held that the defendant railroad corporation, whose stock and property had been purchased by the federal Government, and which was engaged in performing governmental and public purposes, enjoyed the Government's immunity for the torts of its agents. On the other hand, the United States Shipping Board Emergency Fleet Corporation, which was organized for the governmental building and operating of ships for the federal government, all of whose stock was owned by the United States and which entered into contracts "representing the United States of America" was deemed not to enjoy the Government's immunity from suit (except in the way prescribed by statute), but to be subject to suit like any other corporation, and this, although all its expenses and deficits and even judgments against it, are paid from Congressional appropriations.<sup>89</sup> This decision, rendered by Justice Holmes, the most vigorous defender

<sup>86</sup> *Mersey Docks Trustees v. Gibbs* (1866) L. R. 1 H. L. 93, 111; *Mersey Docks Trustees v. Cameron* (1864, H. L.) 11 Eng. Rep. 443; *Gilbert v. Trinity House Corporation* (1886) L. R. 17 Q. B. Div. 795. But in several cases incorporation was deemed not to affect the sovereign character of the board or official or department sued (see *supra*) so that in England it may fairly be said that incorporation, of itself is immaterial in determining the immunity of a particular body from suit. See *Roper v. Public Works Commissioners* [1915] 1 K. B. 45.

<sup>87</sup> (1824, U. S.) 9 Wheat. 904, 907. See also the remarks of Lord Stowell in *The Swift* (1813) 1 Dod. 320, 329, quoted by Mack, J., in his learned opinion in *The Pesaro* (1921, S. D. N. Y.) 277 Fed. 473, 476. Cf. (1922) 35 HARV. L. REV. 330.

<sup>88</sup> (1919, C. C. A. 9th) 259 Fed. 183. See 8 A. L. R. 995, note.

<sup>89</sup> *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.* (1922) 258 U. S. 549, 42 Sup. Ct. 386, three justices dissenting. It had previously been held that an inspector of the Fleet Corp. was not an "agent of the United States" within the terms of a penal statute. *United States v. Strang* (1921) 254 U. S. 491, 41 Sup. Ct. 165; 21 Col. L. Rev. 485. See also *United States v. Walter* (1923) 263 U. S. 15, 44 Sup. Ct. 10; *United States Grain Corporation v. Phillips* (1922) 261 U. S. 106, 43 Sup. Ct. 283.

of the sanctity of the doctrine of State immunity,<sup>90</sup> would seem to indicate the vulnerability of the doctrine in the eyes of its most convinced proponent; for it seems hardly reasonable that the mere intermediation of a corporation organized and owned by the State for the performance of a particular function of the Government should alter so settled a principle as State immunity, a principle which is fully enforced when the enterprise is conducted by a State official or commissioner<sup>91</sup>—unless indeed the conclusion is drawn, as we think it must be, that the doctrine rests not on rational and substantial, but on antiquated and technical grounds, and that the courts eagerly seek artificial methods of escape from its implications. This seems the more apparent when it is observed that the Supreme Court has had no hesitation in finding these corporations to be Governmental agencies and instrumentalities for the purpose of escaping the exercise upon them of the reserved powers of the states, such as the taxing power, whether the Government owned all<sup>92</sup> or only some<sup>93</sup> or none<sup>94</sup> of the stock. In England, a more logical result is attained by the conclusion that in determining whether or not a particular body or official is a "servant of the Crown" and protected by its shield from suit, the question of incorporation is really immaterial.<sup>95</sup>

The suability and liability of a corporation organized by authority of a State to carry on some particular function of government is on the whole decided in State courts on more logical grounds than in the federal Supreme Court, though the conclusions are by no means uniform. These courts seek to determine primarily whether the corporation is a State agency acting without pecuniary profit or a private corporation acting in private interests, and therefore exempt or not from suit.

<sup>90</sup> See *Kawananakoa v. Polyblank* (1905) 205 U. S. 349, 353, 27 Sup. Ct. 526, 527; *The Western Maid, United States v. Thompson* (1922) 257 U. S. 419, 433, 42 Sup. Ct. 159, 161. These cases and the theory of Mr. Justice Holmes will be discussed further *infra*.

<sup>91</sup> *Murray v. Wilson Distilling Co.* (1909) 213 U. S. 151, 29 Sup. Ct. 458.

<sup>92</sup> *Panama Railroad Co. v. Minnix* (1922, C. C. A. 5th) 282 Fed. 47; *Ingram Day Lumber Co. v. United States . . . Emergency Fleet Corp.* (1920, S. D. Miss.) 267 Fed. 283. The United States Spruce Production Corporation, all of whose stock was owned by the United States Government, held exempt from state taxation: *U. S. Spruce Production Corporation v. Lincoln County* (1922, D. Or.) 285 Fed. 388. *Callam County, Wash. v. United States* (1923) 263 U. S. 341, 44 Sup. Ct. 121.

<sup>93</sup> *McCullough v. Maryland* (1819, U. S.) 4 Wheat. 316, 407; *Osborn v. United States Bank* (1824, U. S.) 9 Wheat. 738, 860.

<sup>94</sup> *Luxton v. North River Bridge Co.* (1894) 153 U. S. 525, 529, 14 Sup. Ct. 891, 892; *First National Bank v. Union Trust Co.* (1917) 244 U. S. 416, 425, 37 Sup. Ct. 734, 737; *Smith v. Kansas City Title Co.* (1921) 255 U. S. 180, 208, 41 Sup. Ct. 243, 249.

<sup>95</sup> *Bainbridge v. Postmaster-General* [1906] 1 K. B. 178; *Roper v. Public Works Commissioners* [1915] 1 K. B. 45, 52.



Thus, actions against agricultural societies conducting state fairs,<sup>96</sup> against state prisons,<sup>97</sup> insane asylums,<sup>98</sup> hospitals,<sup>99</sup> educational institutions,<sup>100</sup> or boards of education,<sup>101</sup> state homes for disabled soldiers,<sup>102</sup>

<sup>96</sup> *Morrison v. MacLaren* (1915) 160 Wis. 621, 152 N. W. 475; *L. R. A.* 1915 E. 469, note; *Zoeller v. State Board of Agriculture* (1915) 163 Ky. 446, 173 S. W. 1143; *Minear v. State Board of Agriculture* (1913) 259 Ill. 549, 102 N. E. 1082, Ann. Cases 1914 B, 1290, and cases there cited. The fact that the statute enables these corporations to sue and be sued, was held not to enlarge their substantive liability. But see *contra: Dunn v. Brown County Agricultural Society* (1888) 46 Ohio St. 93, 18 N. E. 496; *Lane v. Minnesota State Agr. Soc.* (1895) 52 Minn. 175, 64 N. W. 382 (under a statute subsequently amended); see also *Berman v. Same* (1904) 93 Minn. 125, 100 N. W. 732.

Where the state is sued directly the immunity is, of course, the more clear. *Melvin v. State of California* (1898) 121 Calif. 16, 53 Pac. 416. The case of *Arnold v. State* (1914, 3d Dept.) 163 App. Div. 253, 148 N. Y. Supp. 479, rests upon a statute, sec. 264 of the late Code of Civil Procedure, which allowed a claim against the state for a "wrongful act, neglect or default." The plain words of this statute have been construed into comparative meaninglessness by the Court of Appeals in *Smith v. New York* (1920) 227 N. Y. 405, 125 N. E. 841, *supra* note 16, although where the wrongful act caused death and not a lesser injury it would seem that the claim must lie.

<sup>97</sup> *Moody v. State Prison* (1901) 128 N. C. 12, 38 S. E. 131. (Non-suability as state agency.) But see *Trevett v. Prison Asso.* (1900) 98 Va. 332, 36 S. E. 373, where the statute of incorporation was deemed to give it a more private character. The issue whether it is a governmental non-profit association or a private corporation will often turn upon the statute.

<sup>98</sup> *Leavell v. West Kentucky Asylum for the Insane* (1906) 122 Ky. 213, 91 S. W. 671; yet, while it could not be sued in tort, as a state agency, a suit to abate a nuisance, a preventive remedy, was allowed against such an asylum. *Herr v. Central Kentucky Lunatic Asylum* (1895) 97 Ky. 458, 30 S. W. 971.

<sup>99</sup> *White v. Alabama Insane Hospital* (1903) 138 Ala. 479, 35 So. 454; *Maia v. Eastern State Hospital* (1899) 97 Va. 507, 34 S. E. 617.

<sup>100</sup> *Abston v. Waldon Academy* (1906) 118 Tenn. 24, 102 S. W. 351; *Alabama Girls Industrial School v. Reynolds* (1905) 143 Ala. 579, 42 So. 114; *Same v. Addler* (1905) 144 Ala. 555, 42 So. 116 (held immune from suit, under Alabama constitution, notwithstanding creating statute which enabled it "to sue and be sued"). *Oklahoma Agr. and M. College v. Willis* (1898) 6 Okla. 593, 52 Pac. 921. See (1920) 5 CORN. L. QUART. 78. But see *Medical College v. Rushing* (1907) 1 Ga. App. 468, 57 S. E. 1083; *Dunn v. University of Oregon* (1881) 9 Or. 357 (title to property in issue); and *Scott v. Univ. of Michigan A. A.* (1908) 152 Mich. 684, 116 N. W. 624, where it was held that in running a football game, the University was engaged in a "corporate or private" function and liable in tort. So a state university may be sued for salary, merely because it was a corporation. *University of Illinois v. Bruner* (1898) 175 Ill. 307, 51 N. E. 687; *Ward v. State Agricultural College* (1905, C. C. A. 8th) 138 Fed. 372.

In *Hopkins v. Clemson College* (1910) 221 U. S. 636, 31 Sup. Ct. 654, the Supreme Court, under its general view that an intervening corporation destroys the immunity of the State, held the corporation liable for a tort.

<sup>101</sup> *Kinnare v. Chicago* (1898) 171 Ill. 332, 49 N. E. 536; *Daniels v. Board of Education* (1916) 191 Mich. 339, 158 N. W. 23, *L. R. A.* 1916 F, 468; *Board of Education v. Volk* (1905) 72 Ohio St. 469, 74 N. E. 646. See 9 A. L. R. 911, note. But in New York and occasionally elsewhere, boards of education have been held liable for their own negligence, as distinguished from that of their servants.

commissions for public works,<sup>103</sup> harbor commissioners<sup>104</sup> have been deemed not to lie either at all, or at least for torts of its agents and servants, on the ground that the corporation was a State agency and performing a governmental function. Less satisfactory is the conclusion reached in several of these cases that though the corporation may by its charter and the general corporation laws of the state sue and be sued, this merely permits suit in contract and for special purposes, but

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*Wahrmann v. Board of Education* (1907) 187 N. Y. 331, 80 N. E. 192; *Jaked v. Board of Education* (1921, 3d Dept.) 198 App. Div. 113, 189 N. Y. Supp. 697; *Herman v. Board of Education* (1922) 234 N. Y. 196, 137 N. E. 24; *Ferris v. Board of Education* (1899) 122 Mich. 315, 81 N. W. 98 (this was a trespass on adjoining property, a nuisance created by a city building; in such cases, municipal liability is not uncommon). The liability is that of the corporation, not of the individual members of the Board.

So a board of education has been held liable for conversion in appropriating the property of another for a heating plant in a school. *Titusville Iron Co. v. New York* (1912) 207 N. Y. 203, 100 N. E. 806; but see *contra: McClure Bros. v. School District 79* (1899) 79 Mo. App. 80.

School districts, like counties and other quasi-public corporations, occupy, as a state agency, the same status as the state itself. *Wiest v. School District 24* (1914) 68 Or. 474, 137 Pac. 749, 49 L. R. A. (N. S.) 1026; *Juhl v. School District* (1918) 168 Wis. 111, 169 N. W. 309, and note in 9 A. L. R. 911. But statute may authorize action for tort. *Howard v. Tacoma School District* (1917) 88 Wash. 167, 152 Pac. 1004, later repealed by statute adopting general rule. *Stovall v. School District* (1920) 110 Wash. 97, 188 Pac. 12, 9 A. L. R. 908. In England, the local education authorities are liable for torts. *Smith v. Martin* [1911] 2 K. B. 775; *Ching v. Surrey County Council* [1910] 1 K. B. 736, and cases cited in 9 A. L. R. 912-913, and a similar case in New York, *Bassett v. Fish* (1878) 75 N. Y. 303; see 49 L. R. A. (N. S.) 1031, note. In relying upon *Mersey Docks Trustees v. Gibbs*, *supra* note 86, a case of *respondeat superior*, the New York Court of Appeals drew upon an erroneous analogy.

<sup>102</sup> *Overholser v. National Home* (1903) 68 Ohio St. 236, 67 N. E. 487; *Lyle v. National Home* (1909, E. D. Tenn.) 170 Fed. 842. (Both arguments intermingled—"charitable corporation created by the state itself for governmental purposes solely.")

<sup>103</sup> Commission for building State Capitol. *Cope v. Hastings* (1897) 183 Pa. 300, 38 Atl. 717. *Friend v. Public Works* (1900) 7 Ohio Dec. Reprint 56. The Federal Control Act authorized the Director of Railroads to be named as a defendant in suits against railroads taken under federal control. *Missouri Pacific R. R. Co. v. Ault* (1921) 256 U. S. 554, 41 Sup. Ct. 593.

Where the government operates railroads, it is not, in the absence of statute, liable for torts. *Western & Atlantic R. R. v. Carlton* (1850) 28 Ga., 180, 182. *Regina v. McLeod* (1883) 8 Can. Sup. Ct. 1 and cases cited *supra* note 44. An intelligent method of dealing with this situation is that adopted in New South Wales and other Australian states, where the Railway Commissioners are sued, but the Crown by statute indemnifies them, as the British Crown does the commanders of its warships negligently injuring a private vessel. *Saunders v. The Railway Commissioners* (1920) 21 N. S. W. 7.

<sup>104</sup> *Chapman v. State* (1894) 104 Calif. 690, 38 Pac. 457; *Denning v. State* (1899) 123 Calif. 316, 55 Pac. 1000. But a river corporation having supervision and control of the James River was held subject to suit. *Tompkins v. Kanawha Board* (1881) 19 W. Va. 257.

does not permit an action arising out of the torts of its officers.<sup>105</sup> This is not altogether different from the narrow construction given to various statutes permitting the state to be sued on claims against it, where the courts assumed that the legislature merely intended to afford the claimant a remedy in the courts, but not to create any new grounds of state liability, such as for torts.<sup>106</sup> Thus, as a state agency it either cannot be sued at all, or if suable, it escapes liability for the torts of its agents and servants. It has been suggested that such corporations, in appointing agents and servants to perform public duties, are themselves merely superior officers deriving no individual or corporate benefits, but merely acting as appointing or employing agents for their principal, the State. Thus, so far as concerns delegable duties, both State and corporation escape legal responsibility for the torts of subordinates.<sup>107</sup> It is important then to determine who is the agent and who the principal. There is a tendency, moreover, occasionally to apply the "trust fund" doctrine, which exempts charitable institutions in some jurisdictions from liability for the torts of agents, to state institutions maintained for public, often charitable, purposes.<sup>108</sup>

Courts dealing with state corporate agencies of the character just mentioned are occasionally driven to determine, as in the case of municipal corporations, whether the particular activity of the corporate agency was "governmental" or "corporate" in character, and the nature and purpose of the corporation, with a tendency to adopt the mistaken "ultra vires" doctrine and release the corporation from liability for the torts of its agents.<sup>109</sup> It often becomes necessary to determine whether the tort-feasor is an agency or sub-division of the State sharing its immuni-

<sup>105</sup> *Miner v. State Board of Agriculture* (1913) 259 Ill. 549, 102 N. E. 1082; *Morrison v. MacLaren* (1915) 160 Wis. 621, 152 N. W. 475; *Roper v. Public Works Commissioners* [1915] 1 K. B. 45. In this last case, while tort actions were excluded because of the sovereign character of the incorporated Commissioners of His Majesty's Works and Public Buildings, yet an action in contract was admitted, without requiring the usual petition of right.

<sup>106</sup> *Supra*, "STATUTORY CONSTRUCTION."

<sup>107</sup> See McCaskill, *Respondeat Superior* (1920) 5 CORN. L. QUART. 409, 419.

<sup>108</sup> *Perry v. House of Refuge* (1884) 63 Md. 20; *Williamson v. Industrial School* (1894) 95 Ky. 251, 24 S. W. 1065; *Ford v. Kendall School District* (1888) 121 Pa. 543, 15 Atl. 812. See McCaskill, *Respondeat Superior* (1920) 6 CORN. L. QUART. 62 *et seq.*

<sup>109</sup> *Louisville & Nashville R. R. Co. v. Burr* (1913) 63 Fla. 491, 58 So. 543. This *ultra vires* argument, as already observed, is frequently adopted to enable state officers, about to enforce invalid statutes or otherwise act illegally, to be enjoined, the act being deemed, by a convenient fiction, their personal act. The *ultra vires* argument, in its most extreme form, insuring complete immunity for torts of agents, reads as follows (quoting from *Board of Education v. Volk* (1905) 72 Ohio St. 469, 74 N. E. 646): "The board is not authorized to commit a tort, to be careless or negligent; and, when it commits a wrong or tort, it does not in that respect represent the district, and, for its negligence or tort in any form, the board cannot make the district liable."

ties, or an independent contractor with the State.<sup>110</sup> As may be imagined the decisions are not harmonious, furnishing additional evidence, if that were needed, that the whole subject, enmeshed in artificialities and unsound distinctions, requires re-examination in the light of principle and reason.

#### UNITED STATES GOVERNMENT

The peculiar nature of the federal government induced special rules governing the legal relations arising out of governmental invasion of private rights. Although the Constitution provides that "private property" shall not "be taken for public use without just compensation," there was down to 1855, due to the governmental immunity from suit, no legal means of making the requirement effective. Claimants against the Government were compelled to adjure Congress to redress their grievances. The defects of this system, both for the claimant and for the members of Congress, brought about in 1855 the establishment of the Court of Claims,<sup>111</sup> with jurisdiction, first advisory, later made final, over specified types of claims. The Act provided:

"The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulations of an executive department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by petition filed therein; and also all claims which may be referred to said court by either house of Congress."

This act was slightly amended in 1887 by adding, *inter alia*, to the words "law of Congress" the phrase "upon the Constitution of the United States," and adding after the clause referring to "any contract, express or implied," the clause "or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable."<sup>112</sup>

<sup>110</sup> *Murtha v. New York Homeopathic Medical College and Flower Hospital* (1920) 228 N. Y. 183, 228 N. E. 722. (Defendant liable, as mere contractor, for negligently running over plaintiff.) Limiting *Corbett v. St. Vincent's Industrial School* (1903) 177 N. Y. 16, 68 N. E. 997. See the learned articles of O. L. McCaskill, *op. cit. supra* notes 107, 108.

<sup>111</sup> Act of Feb. 24, 1855, c. 122 (10 Stat. at L. 612).

<sup>112</sup> Act of March 3, 1887, c. 359 (24 Stat. at L. 505). Concurrent jurisdiction was given to the district and circuit courts in cases under \$3,000. It is not intended to examine the history of the Court of Claims and the many special acts of Congress which have referred cases to the Court of Claims for judgment, advice or findings of fact. The history of the Court of Claims and some reference to its jurisdiction in specific cases will be found in the following literature: Judge Richardson, a member of the Court, *History of the Court of Claims* (1882) 7 So. L. REV. 781, also printed in 17 Ct. Cl. 3, and printed separately; a scholarly article by Ernst Freund, *Private claims against the state* (1893) 8 POL. SC. QUART. 625; C. C. Binney, *Origin and development of legal recourse against the United States* (1909) 57 AMER. LAW REG. 372 and C. C. Binney, *Element of tort as affecting the legal*

Aside from certain special statutes referring to the Court of Claims a few cases not included in the statute, including a few tort cases, some of which we shall take occasion to mention, the Act of 1887, known as the Tucker Act, embodies the maximum concession which under general law Congress was willing to make to those sustaining injury at the hands of the United States. The Supreme Court, however, has so construed the Act as to limit very materially the broad terms of relief which the Act appears to grant. For example, the Act gave jurisdiction to the Court of Claims in claims based "upon the Constitution of the United States." Judge Nott, one of the ablest judges the Court has had, pointed out in *Stovall, Adm. v. United States*<sup>113</sup> that the purpose of this clause was to enable owners of property who, like Langford,<sup>114</sup> had been deprived of their property by the United States government or its officers, whether claiming the title or not, to recover in the Court of Claims the compensation to which the Constitution seemed to entitle them. But the Supreme Court has construed the clause quite differently; in fact, the clause seems to have added nothing to the limited jurisdiction theretofore exercised.<sup>115</sup> It would seem that when a claimant, like Langford or Hill,<sup>116</sup> could show that he was the owner of property and that the United States Government, through its officers, had taken it from him for a public use, that he had done all that was necessary to prove his right to receive compensation under the Fifth Amendment. Not so. He must in addition prove that the Government has "taken" the property under an express or implied contract to pay for it. Thus, we find the Supreme Court asserting<sup>117</sup> that "the right to bring suit against the United States

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*liability of the United States* (1911) 20 YALE LAW JOURNAL, 95; Judge Atkinson, *The United States Court of Claims* (1912) 46 AMER. LAW REV. 227; Ex-Chief Justice Stanton J. Peelle, *Origin and jurisdiction of the United States Court of Claims* (1922) 10 GEORGETOWN L. JOUR. 1; Judson A. Crane, *Jurisdiction of the United States Court of Claims* (1920) 34 HARV. L. REV. 161; Harlan, J., in *United States v. New York* (1896) 160 U. S. 598, 16 Sup. Ct. 402. The statute is now to be found in the Judicial Code, sec. 145 *et seq.* (36 Stat. at L. 1135) and 5 Fed. Stat. Anno. (2d ed. 1917) 650. See also the valuable comments in (1923) 36 HARV. L. REV. 866 and (1923) 32 YALE LAW JOURNAL, 725.

<sup>113</sup> (1891) 26 Ct. Cl. 226, 239.

<sup>114</sup> *Langford v. United States* (1879) 101 U. S. 341.

<sup>115</sup> Practically no case has been able to stand on "the Constitution of the United States." It is necessary to prove that the claim, unless a law of Congress refers it to the Court, arises out of a contract, express or implied. While it seems to have been thought that the limitation of claims "not sounding in tort" did not apply to the claims arising under the Constitution, (*Dooley v. United States* (1901) 182 U. S. 222, 21 Sup. Ct. 762; *Basso v. United States* (1905) 40 Ct. Cl. 202; *Christie-Street Commission v. United States* (1905, C. C. A. 8th) 136 Fed. 326), it now seems practically certain that it does so apply. *Basso v. United States* (1915) 239 U. S. 602, 36 Sup. Ct. 226.

<sup>116</sup> *Hill v. United States* (1893) 149 U. S. 593, 13 Sup. Ct. 1011.

<sup>117</sup> *United States v. North American Transportation Co.* (1920) 253 U. S. 330, 335, 40 Sup. Ct. 518.

in the Court of Claims is not founded upon the Fifth Amendment<sup>118</sup> but upon the existence of an implied contract entered into by the United States."

Even this would not be so serious were the words "taking" and "implied contract" given a fairly liberal construction protective of the private right. But awed by the inhibition against claims "sounding in tort" and by the traditional view that the government's consent to be sued is to be construed as narrowly as possible, the Supreme Court has given an exceedingly technical construction to the terms "taking" and "implied contract" and a very wide interpretation to the clause "sounding in tort." Thus the physical act of "taking" must so greatly interfere with the private use that the injury and deprivation are permanent and substantial,<sup>119</sup> hence implying a contractual obligation to pay, and not merely temporary, or consequential, and therefore tortious.<sup>120</sup> There must be an intent to "take" which need not be expressed, however, but may be inferred from the circumstances. Thus a denial or questioning of the owner's right to the property, by the assertion by the Government of an adverse or constitutional claim<sup>121</sup> or the denial of an intent to pay<sup>122</sup>

<sup>118</sup> *Schillinger v. United States* (1894) 155 U. S. 163, 15 Sup. Ct. 85; *Basso v. United States* (1915) 239 U. S. 602, 36 Sup. Ct. 226.

<sup>119</sup> A "taking" because of the permanent nature of the injury inflicted by the Government operation, usually an improvement in some public work, like a navigable stream, was found in the following leading cases: *Pumpelly v. Green Bay Co.* (1871, U. S.) 13 Wall. 166 (land); *United States v. Lynch* (1903) 188 U. S. 445, 23 Sup. Ct. 349 (flooding, permanently destroying the utility of the land); *United States v. Welch* (1910) 217 U. S. 333, 30 Sup. Ct. 527 (easement); *United States v. Cress* (1917) 243 U. S. 316, 37 Sup. Ct. 380 (fall necessary to operate a mill); but see *contra*: *Monongahela Navigation Co. v. Coons* (1843, Pa.) 6 Watts & S. 101. *Portsmouth Land and Hotel Co. v. United States* (1922) 260 U. S. 327, 43 Sup. Ct. 135 (coast defense guns fired across land frequently, making it uninhabitable).

<sup>120</sup> *Jackson v. United States* (1913) 230 U. S. 1, 33 Sup. Ct. 1011 (intermittent flooding of land); *Cubbins v. Mississippi River Commission* (1916) 241 U. S. 351, 36 Sup. Ct. 671 (same); *Sanguinetti v. United States* (1924) 264 U. S. 146, 44 Sup. Ct. 264; *Scranton v. Wheeler* (1900) 179 U. S. 141, 21 Sup. Ct. 48 (interruption of riparian access); *Peabody v. United States* (1913) 231 U. S. 530, 34 Sup. Ct. 159; *Willink v. United States* (1916) 240 U. S. 572, 36 Sup. Ct. 422 (extension of harbor line across plaintiff's land). The language used in *Transportation Co. v. Chicago* (1878) 99 U. S. 635: "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision," establishes a general standard, rather than a helpful criterion for the determination of cases.

The provision now so frequently found in state constitutions by which property taken "or damaged" must be paid for, should also be adopted by the federal government, in view of the narrow construction given to the word "taken."

<sup>121</sup> *Hill v. United States* (1893) 149 U. S. 593, 13 Sup. Ct. 1011; *Langford v. United States* (1879) 101 U. S. 341. Had Justice Shiras' dissenting opinion in *Hill v. United States* prevailed, namely, that it was only necessary to prove title and deprivation to invoke the Fifth Amendment, these artificial distinctions would

will defeat recovery, for the taking is then tortious. The more flagrant and unjustifiable the Government's act, the less becomes its liability, hardly a commendable principle of law. Even a district attorney, by pleading the Government's title, or denying the plaintiff's right or title or an intent to take or pay, can, it seems, defeat the owner's just claim to compensation. Moreover, the circumstances must not negative the owner's consent or at least tacit acquiescence, otherwise the plaintiff will defeat that consensual relation, which is supposed to underlie the implied contract—implied in fact rather than law.<sup>123</sup> For mere evidence of enrichment of the Government is sufficient to raise the implication of payment; a quasi-contractual obligation will not be recognized, unless, as in tort cases, specially covered by a law of Congress conferring jurisdiction.<sup>124</sup> Moreover, it is not possible, as it is in so many cases at common law, to waive the tort, and sue *in assumpsit*,<sup>125</sup> though the English courts seem more disposed to permit the pursuit of a remedy by petition of right where the alleged breach of duty arose out of what was origin-

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have become unnecessary. They were applied in the patent cases, *Schillinger v. United States* (1894) 155 U. S. 163, 15 Sup. Ct. 85; *United States v. Palmer* (1888) 128 U. S. 262, 9 Sup. Ct. 104, until the Act of June 25, 1910 (36 Stat. at L. 851) giving the claimant an action in the Court of Claims for patent infringement by the Government, made them obsolete. (See also dissenting opinion by Harlan, J.) See also *Tempel v. United States* (1918) 248 U. S. 121, 39 Sup. Ct. 56.

<sup>123</sup> *Harley v. United States* (1905) 198 U. S. 229, 25 Sup. Ct. 634; *Ball Engineering Co. v. White* (1918) 250 U. S. 46, 39 Sup. Ct. 393; *Curved Electrotype Plate Co. v. United States* (1915) 50 Ct. Cl. 258.

The admission of the claimant's right will of course lay the foundation for an implied contract. *United States v. Great Falls Mfg. Co.* (1884) 112 U. S. 645, 5 Sup. Ct. 305; *United States v. Berdan Firearms Co.* (1894) 156 U. S. 552, 15 Sup. Ct. 420.

In England, the trial of title to property claimed or held by the Crown was one of the earliest functions of the petition of right. *Monckton v. Att'y Gen.* (1850, Ch.) 2 Mac. & G. \*402; *Doe d. Legh v. Roe* (1841, Exch.) 8 M. & W. 579; Robertson, *op. cit.*, 332. It is assumed that one of the parties is wrong, and it makes no difference that one or both make a "claim of right." Either the property or compensation can be recovered. See *Feather v. Regina* (1865, K. B.) 6 B. & S. 257, 294, 122 Eng. Rep. 1191, 1204. Of course, an action of ejectment against the Government officer lies in the United States, as in *United States v. Lee*, *supra* note 11, provided the Government does not undertake too vigorously to cover him with its shield.

<sup>124</sup> *Bradford v. United States* (1911) 47 Ct. Cl. 141; *Jefferson Lime Co. v. United States* (1913) 48 Ct. Cl. 274.

<sup>125</sup> *Dooley v. United States* (1901) 182 U. S. 222, 21 Sup. Ct. 762.

<sup>126</sup> *McArthur v. United States* (1894, U. S.) 29 Ct. Cl. 191; *Mann v. United States* (1897, U. S.) 32 Ct. Cl. 580; *Ribas y Hijo v. United States* (1904) 194 U. S. 315, 24 Sup. Ct. 727. Before the phrase "not sounding in tort" was introduced by the Tucker Act, there was greater willingness to permit a cause of action to be framed in contract. See *United States v. Russell* (1871, U. S.) 13 Wall. 623. On the confusion prevailing in private law in this matter, see Arthur L. Corbin, *Waiver of Tort and Suit in Assumpsit* (1910) 19 YALE LAW JOURNAL, 221.

ally a contractual relation.<sup>126</sup> Of course, the taking or contract, whether express or implied, must be authorized; anyone dealing with a government agent is bound by the limits of his actual, not ostensible, authority. To this requirement, the Supreme Court has given a very strict construction.<sup>127</sup> Unless a claimant is fortunate enough to be able to climb all these hurdles, he is likely to find his claim dismissed as "sounding in tort."<sup>128</sup> The reluctance of the Supreme Court to widen the relief of the individual injured and compelling him rather than the public at large to bear the risk of a defective public service, is due to the individualistic conceptions which lie at the foundation of the American theory of state immunity from suit and responsibility and to the erroneous belief that by being held to discharge obligations, the public service is hampered. As we shall endeavor to point out hereafter, quite the contrary is true.

In recent years a growing legislative tendency has been manifested to assume liability for the torts of agents and officers. This is true both of the states and of the United States. It has already been observed that the United States has permitted suit to be brought in the Court of Claims for infringement of patents.<sup>129</sup> Special statutes are often passed, either appropriating funds, after committee investigation, for torts of various kinds or referring such claims to the Court of Claims or United States District Courts for determination and judgment.<sup>130</sup> A federal workman's compensation Act has been passed.<sup>131</sup> In taking over the rail-

<sup>126</sup> *Windsor & Annapolis R. Co. v. The Queen* (1886, P. C.) 11 A. C. 607.

<sup>127</sup> *Cartas v. United States* (1919) 250 U. S. 545, 40 Sup. Ct. 42; *United States v. North American Transportation & Trading Co.* (1920) 253 U. S. 330, 40 Sup. Ct. 518; *Sutton v. United States* (1921) 256 U. S. 575, 41 Sup. Ct. 563. See the dissenting opinion of Brandeis, J. in *Portsmouth Harbor Land & Hotel Co. v. United States* (1922) 260 U. S. 327, 43 Sup. Ct. 135, 140. *United States v. Bentley & Sons Co.* (1923, D. Ohio) 293 Fed. 229.

<sup>128</sup> See, aside from the property cases above mentioned, *Gibbons v. United States* (1868, U. S.) 8 Wall. 269 (loss incurred through delivery of supplies at excessively low price under duress of officer); *Morgan v. United States* (1871, U. S.) 14 Wall. 531 (negligently ordering master of vessel to cross dangerous reef); *German Bank v. United States* (1893) 148 U. S. 573, 13 Sup. Ct. 702 (erroneous cancellation of bonds by Register of the Treasury); *Bigby v. United States* (1903) 188 U. S. 400, 23 Sup. Ct. 468 (fall of elevator in post office building); *Jaragua Iron Co. v. United States* (1909) 212 U. S. 302, 29 Sup. Ct. 385 (destruction of property for war purposes in war area); *Basso v. United States* (1916) 239 U. S. 602, 36 Sup. Ct. 226 (false imprisonment).

<sup>129</sup> Act of June 25, 1910 (36 Stat. at L. 851). *Cramp & Sons v. International Curtis Marine Co.* (1918) 246 U. S. 28, 38 Sup. Ct. 271. England has permitted this since 1907. France, Germany and Austria have long admitted such actions, *infra*.

<sup>130</sup> See, for example, Act of July 31, 1912 (37 Stat. at L. 1285) referring claim of Delaware Transportation Co. for collision with United States collier. See *The Hesperos* (1918, E. D. Va.) 252 Fed. 858 (Act of Apr. 26, 1916 [39 Stat. at L. 1261]).

<sup>131</sup> Compensation for disability or death of an employee "resulting from a personal injury sustained while in the performance of his duty." Act of Sept. 7, 1916, c. 458 (39 Stat. at L. 742).



roads and collateral services and in establishing a Shipping Board for the operation of merchant ships, the Government placed itself in the legal position of a private operator.<sup>132</sup> Congress provided in 1919 for compensation for damage to property by army aircraft,<sup>133</sup> and in 1922, amending earlier acts, made provision for the satisfaction by the heads of the executive departments or independent establishments of the Government of claims for damage to or loss of private property not in excess of \$1,000, "caused by the negligence of any officer or employee of the Government acting within the scope of his employment."<sup>134</sup> If the principle of tort responsibility of the Government has thus been recognized as to all branches of the federal public service, Congress ought easily to be persuaded that the limitation in amount to \$1,000 is unfair and indeed improper. If it is just and sound that the Government should assume responsibility to the public for the torts of its agents, like other corporations, then the principle should be acknowledged without limitation of liability and judicial relief should be afforded.

Great confusion was occasioned by the assumption during the war of government control over the railroad and telegraph systems of the country. Notwithstanding the provisions of section 10 of the Act of Congress of March 21, 1918 that "carriers while under federal control shall be subject to all laws and liabilities as common carriers, . . . and that in actions at law or suits in equity against the carrier . . . no defense shall be made . . . that the carrier is an instrumentality or agency of the federal government," it seemed to many courts very doubtful whether a company could constitutionally be rendered liable for an act done by the federal government and its employees. To overcome this doubt the Director General of Railroads issued a General Order to the effect that he should be named as defendant, but this only added to the confusion, for several courts promptly held it contrary to the statute and invalid, whereas others held it valid,<sup>135</sup> though

<sup>132</sup> Act of March 21, 1918 (40 Stat. at L. 456) (railroads); Act of Sept. 7, 1916 (39 Stat. at L. 728) sec. 9; Act of March 9, 1920 (41 Stat. at L. 525). See *infra*.

<sup>133</sup> Act of July 11, 1919, c. 8 (41 Stat. at L. 109). Many other cases of various types, mostly requisition cases, were referred to the United States District Courts and the Court of Claims during the war. See the list of these in *United States v. Pfitsch* (1921) 256 U. S. 547, 553, note, 41 Sup. Ct. 569, 571.

<sup>134</sup> Act of December 28, 1922, c. 17 (42 Stat. at L. 1066); an Act of the same day, c. 16, gave the Secretary of the Navy power to settle collision claims up to \$3,000 (42 Stat. at L. 1066).

<sup>135</sup> Held invalid in Alabama, Louisiana, Mississippi, North and South Dakota, and Wisconsin. Held valid in the Circuit Court of Appeals, eighth circuit, a few federal district courts and in Virginia, Michigan, and South Carolina, and finally by the United States Supreme Court in *Missouri Pac. R. R. Co. v. Ault* (1921) 256 U. S. 554, 41 Sup. Ct. 593, holding that the term "carriers" in the Act authorizing suits "against carriers" meant the systems and not the corporations and that Congress intended to grant a limited consent to suit against the government, the

there was no certain means of paying any judgment and the Act of March 21, 1918 had forbidden any levying of process against the property of the railroads. The confusion, largely arising out of the narrow construction given to an assumed governmental consent to suit, gave rise to a great amount of litigation, most of which might have been avoided had Congress and the Courts not labored under a traditional preconception against governmental liability to suit.

In the telegraph cases Congress had failed to provide even for the constitutionally doubtful method of a suit against the company or system or against the Government, and as the companies were not deemed operating agents of the Government, it would seem that no one could be sued for torts committed by employees in the operation of the telegraph system, except possibly some more or less irresponsible subordinate employee personally negligent.<sup>136</sup> Even the existence of an indemnity contract between the Government and the company by which the Government agreed to hold the company harmless for judgments found against it during governmental control, did not, said the Supreme Court, authorize a suit against the company; and the absence of any special statute, of course, left the rule of governmental immunity from suit in full force. The fact that Judge Learned Hand permitted a suit to lie against the Government under the Tucker Act for breach of an implied contract to transmit a cable message during federal control of a cable company<sup>137</sup> opens the door but slightly and indicates to how great an extent irresponsibility was substituted for responsibility by the assumption of federal control of the telegraph systems.

The question of governmental immunity from suit when engaged in the operation of a public service has been frequently litigated in admiralty in the case of injuries inflicted upon private vessels by ships owned or operated by the Government. Such government control and operation of merchant shipping has survived the war in many countries, and in the United States and England has led to an exhaustive examination of the whole subject. The results are not harmonious or satisfactory. In the United States, the act creating the Shipping Board<sup>138</sup>

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Director General of Railroads being the proper person, therefore, to appear as defendant. This complicated question of statutory construction, which is of collateral interest only, is discussed with citation of the many conflicting decisions in *Valvoline Oil Co. v. Davis* (1922, C. C. A. 2d) 282 Fed. 216 and in (1920) 5 CORN. L. QUART. 203-209; (1919) 88 CENT. L. JOUR. 352 and 89 *ibid.* 157; (1921) 27 CASE & COMMENT 35, 42, 58, 4 A. L. R. 1680, 8 A. L. R. 969 and 10 A. L. R. 956.  
<sup>136</sup> *Western Union Telegraph Co. v. Poston* (1921) 256 U. S. 662, 41 Sup. Ct. 508, and also decisions of state courts cited in the note of Brandeis, J., in that opinion and in (1919) 33 HARV. L. REV. 322.

<sup>137</sup> *Heil v. United States* (1921, S. D. N. Y.) 273 Fed. 729.

<sup>138</sup> Act of Sept. 7, 1916 (39 Stat. at L. 728, sec. 9). By Act of June 17, 1910 (36 Stat. at L. 537) and Act of June 24, 1910 (36 Stat. at L. 607) authority is given to the Secretary of Commerce to adjust claims for collision for which

provided that merchant ships operated by the United States Shipping Board, including vessels purchased, chartered or leased from them, "shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien or other interest therein." After such a vessel had been arrested, however,<sup>139</sup> and the threat to the continuity of voyages and operations of government by arrest of vessels became apparent, a new statute was passed substituting for the former seizure and arrest of vessels and cargoes<sup>140</sup> an action *in personam* against the United States in admiralty causes arising out of acts of government-owned merchant vessels. This proper statutory submission to suit, without permitting an actual interference with the operations of government, is a concession to the exigencies of modern life and an indication that the justice of governmental operation with, rather than without, responsibility, is gradually being recognized.

Yet even before this limited statutory recognition of amenability to suit for injuries committed by certain government vessels, the courts had had frequent occasion to deal with the subject. They were moved by conflicting theories. The animistic admiralty theory which personifies the ship as the wrongdoer and permits a libel *in rem* "against the ship" regardless of ownership competed with the common law theory that public property enjoys the same immunity from suit as the sovereign owner himself,<sup>141</sup> and that a suit *in rem* "against the property" will not lie when there was no action against the owner *in personam*. It is not surprising that the effort to reconcile such divergent theories, both grounded in long usage, should have resulted in compromises, distinctions and inferences which, to say the least, make little convincing appeal to reason. The question has been complicated by the fact that courts often have had to deal with the status of ships owned by foreign sovereigns, and have permitted themselves, erroneously, to be influenced

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vessels of the Lighthouse Service shall be found responsible, and to the Secretary of the Navy, in the case of vessels of the Navy, not exceeding in either case \$500 in amount. *The Barendrecht* (1922, S. D. N. Y.) 286 Fed. 386, 390. The latter Act was amended on Dec. 28, 1922 (42 Stat. at L. 1066) to cover claims not exceeding \$3,000, accrued since Apr. 6, 1917 and the former was replaced by a new Act on the same day (42 Stat. at L. 1066) extending the power to all heads of departments to settle claims against their departments, not exceeding \$1,000, arising out of injury to private property due to the negligence of officers or employees within the scope of their authority.

<sup>139</sup> *The "Lake Monroe"* (1919) 250 U. S. 246, 39 Sup. Ct. 460.

<sup>140</sup> Act of March 9, 1920 (41 Stat. at L. 525). But for a libel *in personam* against the United States, the vessel must be in a port of the United States or its possessions. *Blamberg Bros. v. United States* (1923) 260 U. S. 452, 43 Sup. Ct. 179; 23 Col. L. Rev. 594. In *The Snug Harbor* (1922, E. D. Va.) 283 Fed. 1015, the United States was held liable in tort for failure to mark the wreck of its sunken vessels, causing injury.

<sup>141</sup> See Field, J., in *The Siren* (1868, U. S.) 7 Wall. 152.

by the rule of international law exempting foreign public vessels from the local jurisdiction.<sup>142</sup>

If the public vessel is a warship, it is clear that she cannot be libelled,<sup>143</sup> and no action against the United States for her torts would lie. Here the common law rule of sovereign immunity prevails over the admiralty rule of the ship's responsibility for torts, regardless of knowledge or innocence of owners.<sup>144</sup> In England, better justice is attained by having the suit directed against the wrongdoing master, and then having the Lords of the Admiralty, by the Crown counsel and Treasury Solicitor, voluntarily put in an appearance, the Government paying the judgment found against the master.<sup>145</sup> While Congress has on numerous occasions passed special Acts providing for the payment of damages for injuries committed by United States war vessels or referring the claim to the Court of Claims,<sup>146</sup> a bill providing for suits in admiralty for collisions caused by and salvage services rendered to public vessels of the United States has, though introduced in several successive Congresses and favorably reported, failed to become a law.<sup>147</sup> The fact that salvage suits against public vessels have sometimes been sustained as suits arising, when rendered voluntarily, not out of contract, but yet constituting a claim for unliquidated damages not sounding in tort under the Tucker Act,<sup>148</sup> hardly dimin-

<sup>142</sup> The dictum of Haight, J., in *The Johnson Lighterage Co., No. 24* (1916, D. N. J.) 231 Fed. 365, would indicate that the court believed the immunity from suit of the domestic and the foreign sovereign to rest upon the same basis.

<sup>143</sup> *The Athol* (1842, Adm.) 1 W. Rob. 374.

<sup>144</sup> *The China* (1868, U. S.) 7 Wall. 53.

<sup>145</sup> "H. M. S. Sans Pareil" [1900] P. 267; *The Athol* (1842, Adm.) 1 W. Rob. 374. Robertson, *The Law and Practice of Civil Proceedings by and against the Crown* (1908) 525.

<sup>146</sup> See e. g. Act of June 25, 1910, ch. 474 (36 Stat. at L. 1870-1874) "to satisfy certain claims against the Government arising under the Navy Dept." Similar acts are passed at almost every session of Congress. Some of them are referred to by George D. Lord in his article *Admiralty Claims against the Government*, 19 COL. L. REV. 467, 472.

<sup>147</sup> See H. R. 64, Sen. 1662, 63d Cong. 1st sess.; H. R. 6256, 67th Cong. 1st sess., Report of Committee on Admiralty and Maritime Law, 1922, A. B. A. REP. 89; (1923) *ibid.* 117; (1924) *ibid.* 28. The recommendation of the Maritime Association of the United States is to strike the words "merchant vessel" out of the Act of March 9, 1920, so as to make the Government liable for the torts of public ships generally. See *Resolutions of Brussels Conference* (1923) A. B. A. JOUR. 603; Matsunami, *Immunity of State Ships* (1924) 39 *et seq.*, 62 *et seq.*

<sup>148</sup> *United States v. Cornell Steamboat Co.* (1906) 202 U. S. 184, 26 Sup. Ct. 648; *United States v. Morgan* (1900, C. C. A. 4th) 99 Fed. 570, *aff'd* 180 U. S. 638, 21 Sup. Ct. 920. *The Davis* (1869, U. S.) 10 Wall. 15. *The Oloekson* (1922, C. C. A. 5th) 281 Fed. 690; (1922) 32 YALE LAW JOURNAL 183. But in England, it has recently been held that no action in *rem*—dictum added "or otherwise"—lies against the Crown for salvage. *Young v. S. S. Scotia* (P. C.) [1903] A. C.

ishes the propriety and justice of the demand for statutory submission to suit in the case of all injuries committed by public vessels.<sup>149</sup>

When we come to merchant ships greater confusion prevails. The English courts proceed on the theory that no suit lies *in rem*, unless the owner could at common law have been impleaded *in personam*. Under the English theory, moreover, a suit "against the ship" is in the nature merely of a foreign attachment, for the purpose of jurisdiction and security. Thus, jurisdiction is denied in admiralty over public vessels whether engaged in commerce or not.<sup>150</sup> The American courts, more firmly attached to the original admiralty theory which personifies the ship regardless of its owner, have been more disposed to disregard the sovereign character of the defendant owner and seek some ground upon which they could sustain an exception to the rule of governmental immunity. The result has been to leave the laws in a most unsatisfactory state, as has been disclosed by the conflicting decisions rendered during the war, notably in respect of the ships of foreign sovereigns. In numerous cases, the immunity was allowed, on the demand of the owning government, though the courts seem uncertain whether the immunity rests upon sovereignty or upon the public nature of the service in which the ship is engaged.<sup>151</sup> In other cases, the exemption from the jurisdiction was not allowed, either on no well-considered grounds<sup>152</sup> or on distinctions resting on assumed lack of possession on the part of government officers<sup>153</sup> or on the commercial or assumed non-public nature of the service in which the ship was engaged, rather than

501 (a Canadian Government ferry boat). 17 HARV. L. REV. 270. But the Crown usually enters an appearance and offers to pay such salvage as the court directs. *The Marquis of Huntley* (1835, Adm.) 3 Hagg. Adm. 246.

<sup>149</sup> In continental Europe, such action almost always lies in the administrative courts. See *infra*.

<sup>150</sup> *The Parlement Belge* (1880, C. A.) 5 Prob. 197; *The Jassy* [1906] Prob. 270; *The Broadmayne* [1916] Prob. 64 (requisitioned ship operated in government service by private owner); *The Gagara* [1919] Prob. 95.

<sup>151</sup> *Briggs v. Light-Boats* (1865, Mass.) 11 Allen 157 (not in admiralty; deemed to rest on sovereignty); *The Pampa* (1917, E. D. N. Y.) 245 Fed. 137 (an Argentine naval transport employed in carrying a private cargo); *The Maipo* (1918, S. D. N. Y.) 252 Fed. 627, 259 Fed. 367 (a Chilean naval transport chartered to a private individual for commercial purposes, though manned by her naval crew). *The Roseric* (1918, D. N. J.) 254 Fed. 154 (British merchant ship in charge of privately paid crew, but under requisition by the British Government as admiralty transport). See also W. W. Bisschop, *Immunity of States in Maritime Law*, 1922, BRITISH Y. B. INT. L. 159; also McNair, in 1921, *ibid.* 68.

<sup>152</sup> *The Attualita* (1916, C. C. A. 4th) 238 Fed. 909 (Merchant ship requisitioned by the Italian government, but operated by its owners).

<sup>153</sup> This is especially true in the case of liens for salvage, when the ship or cargo is not in the possession of the government or its officers. *The Davis* (1869, U. S.) 10 Wall. 15; *Long v. The Tampico* (1883, S. D. N. Y.) 16 Fed. 491, 501; *The Johnson Lighterage Co., No. 24* (1916, D. N. J.) 231 Fed. 365.

on the mere question of ownership.<sup>154</sup> The soundness of the theory that suit will lie when Government possession is not disturbed, is very questionable;<sup>155</sup> it may have been invented to justify on some plausible ground the enforcement of a lien, usually for salvage, against Government property. When Judge Mack, in his scholarly opinion in *The Pesaro*<sup>156</sup> declined to exempt a merchant vessel owned by the Italian government from the local jurisdiction, especially as she was not immune in the Italian courts, he broke with the English rule of the *Parlement Belge*<sup>157</sup> and laid down a rule which modern life demands, for it is not conceivable that thousands of government ships should roam the seas on ordinary commercial errands and yet escape all responsibility to the law. But whether these Government ships should actually be subject to arrest by the process of foreign courts is a more debatable question; the Act of Congress of March 9, 1920<sup>158</sup> prevents arrest of vessels of the Shipping Board, leaving liability *in personam*, and has sought to effect a similar freedom from arrest in foreign ports. It will hardly be disputed that Government enterprise should not be physically interrupted by judicial process, but this implies the substitution of a voluntary admission of liability for transactions at least of a "non-governmental" character, conceding for the moment the difficulty of drawing an exact line of demarcation between public or governmental and non-governmental functions.<sup>159</sup> But as the rule laid down in *The Pesaro* can hardly prevail over the protest of foreign governments, it would be well in the international field to agree diplomatically upon a voluntary submission to the courts, either the foreign or home courts, in the case of vessels engaged in commerce, as is provided in the case of United States government merchantmen, in the Act of March 9, 1920.

Not the least interesting of the anomalies arising from the attempt to reconcile the admiralty law with the common law in respect to the liability incurred by the torts of those in charge of public vessels, arose in the case of *Workman v. Mayor of New York*,<sup>160</sup> in which suit was

<sup>154</sup> *The Pesaro* (1921, S. D. N. Y.) 277 Fed. 473. See also on this case (1922) 35 HARV. L. REV. 330; (1922) 70 U. PA. L. REV. 322. See also *The Fidelity* (1879, S. D. N. Y.) 16 Blatchf. 569, Fed. Cas. No. 4758 (by Waite, C. J.).

<sup>155</sup> *Briggs v. Light-Boats* (1865, Mass.) 11 Allen 157; *Young v. S. S. Scotia* (P.C.) [1903] A. C. 501; *Vavasseur v. Krupp* (1877, Ch.) 9 Ch. 351. In these cases, among others, possession was held to be immaterial. See Weston, *Actions against the Property of Sovereigns* (1919) 32 HARV. L. REV. 266, 269. Conrad, *Immunity of Public Vessels* in "Lectures on Legal Topics," (1924) N. Y. ST. B. A. REP. 478.

<sup>156</sup> (1921, S. D. N. Y.) 277 Fed. 473.

<sup>157</sup> (1880, C. A.) 5 Prob. 197.

<sup>158</sup> *Supra*, note 140.

<sup>159</sup> See *infra*.

<sup>160</sup> (1900) 179 U. S. 552, 21 Sup. Ct. 212. Four justices dissented. See also *Chicago v. White Transportation Co.* (1917, C. C. A. 7th) 243 Fed. 358; *Rodgers & Hagerty v. City of New York* (1922, C. C. A. 2d) 285 Fed. 362, (1918) 2 MINN. L. REV. 307, and note on liability of municipal corporations in admiralty in L. R. A., 1918 A, 1079.

brought against the city of New York because of a collision caused by the negligent management of a municipal fire-boat in extinguishing a fire along the water-front. The suit was brought *in personam*.<sup>161</sup> It was admitted that a municipal fire-engine equally negligently operated would, being used for governmental purposes, leave the city immune from liability, and that this was the local law in New York.<sup>162</sup> Yet Justice White, exalting the supremacy and symmetry of the maritime law which personifies the wrongdoing ship, though conceding to the common law the immunity from suit of the state, but not of the city, held the city liable for the injury done. His words warrant quotation, and might well be applied to the entire doctrine of immunity from jurisdiction and from the application of the ordinary rules of law which surrounds the activities of the state.

"The disappearance of all symmetry in the maritime law . . . which would thus arise [by conceding immunity] would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice. This must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor."

Yet where the vessel negligently operated was owned by the State of New York under the jurisdiction of the Superintendent of Public Works, the Supreme Court in 1921, in a suit brought in admiralty, had no difficulty in permitting Justice White's "denial of justice" to become imbedded in the maritime law, admitting the supremacy of the common law immunity from suit over the rule of liability in admiralty.<sup>163</sup> Thus we find that there is a vital difference between the liability of a municipal corporation in its governmental activity of extinguishing a fire from the land side and from the water side, and again a vital difference in result,

<sup>161</sup> There is a conflict of authority as to whether a public vessel of a city may be arrested. Cf. *The Fidelity*, *supra* note 154, and *The Oyster Police Steamers of Maryland* (1887, D. Md.) 31 Fed. 763. As to vessels of a state, which are exempt from arrest, see *In re State of New York, The Queen City* (1921, U. S.) 256 U. S. 503, 41 Sup. Ct. 592. In *Thompson Navigation Co. v. Chicago* (1897, N. D. Ill.) 79 Fed. 984, Grosscup, J., permitted suit against the city *in personam*, but not *in rem*.

<sup>162</sup> *Farley v. New York* (1897) 152 N. Y. 222, 227, 46 N. E. 506.

<sup>163</sup> *In re State of New York, Petition of Walsh* (1921) 256 U. S. 490, 41 Sup. Ct. 588. A similar conclusion was reached as to the liability of a Delaware county, an unincorporated governmental subdivision of the State, in a suit in admiralty arising out of the negligent operation of a drawbridge. *The Alex Y. Hanna* (1917, D. Del.) 246 Fed. 157. See *contra*, as to a Massachusetts county, which by statute was corporate and suable. *O'Keefe v. Staples Coal Co.* (1910, D. Mass.) 201 Fed. 131.

depending on the ownership of the boat by the larger group known as the State or the smaller group known as the city. Distinctions of so artificial a character constitute, it is believed, a symptom of the senility of the doctrines on which they are founded.

But the apotheosis of the doctrine in admiralty was reached in 1922. In the case of *United States v. Thompson*<sup>164</sup> it was held by the Supreme Court, speaking through Mr. Justice Holmes, that a Government vessel *could* not commit an injury giving rise to a maritime lien, hence at no time, though the vessel subsequently reached private hands, could such a lien be enforced.<sup>165</sup> This conclusion was derived from the fact that inasmuch as the so-called lien could never have been enforced against the Government, therefore the original collision could not have been a "tort" or an act giving rise to a legal obligation. "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp." Thus, the immediacy of the privilege of enforcement seems to be Justice Holmes' test of the existence of a claim against the Government. Nor can the Government, he says, be guilty of a fault or "tort" since it itself makes the law and is therefore not bound by it, a proposition to which Justice McKenna expressed vigorous dissent. The validity of this theory of Justice Holmes, which he founds upon the authority of Bodin, Hobbes and Austin, we shall have further occasion to examine.<sup>166</sup> But at this point it may be said that his decision leads to the conclusion that the court in previous cases erred in recognizing the validity of liens against public vessels.<sup>167</sup> Moreover, if there never was a "tort" *ab initio*, it would seem wrong to permit, as has often been done, set-off and recoupment against the Government for damages

<sup>164</sup> (1922) 257 U. S. 419, 42 Sup. Ct. 159.

<sup>165</sup> The English Court of Appeal, reversing the court below in *The Tervaete* [1922, C. A.] Prob. 197; *ibid.* 259, has reached the same conclusion as to the survivorship of liens, after the vessel is transferred from public to private ownership, but on grounds a little more satisfactory than those advanced by Justice Holmes. The British court takes the view that a lien, surviving, would diminish the value of Government property in case of sale, but in England at least, as already observed, the commander can be sued for collisions and the Government pays the judgment. See also *The Sylvan Arrow* [1923, C. A.] Prob. 220, where the lien under similar circumstances was denied because defendants were compelled to surrender their ship to the United States Government, during whose operation the collision occurred. Justice Holmes takes the ground that the Government, being immune from suit, is incapable of committing an injury giving rise to legal relations, for it is above the law. Chief Justice Waite in *The Fidelity*, *supra* note 154, also took the position that it was not want of power to sue, but want of liability, which exempted public vessels.

<sup>166</sup> See *infra*.

<sup>167</sup> *The St. Jago de Cuba* (1824, U. S.) 9 Wheat. 409 (lien for seaman's wages); *United States v. Wilder* (1838, C. C. D. Mass.) 3 Sumner 308 (lien for general average); *The Davis* (1869, U. S.) 10 Wall. 15; *United States v. Morgan* (1900, C. C. A. 4th) 99 Fed. 570, 572 (lien for salvage). In these cases, the Government's possession was not disturbed.



by collision and otherwise, where the Government commences the suit;<sup>168</sup> whereas the removal of the procedural difficulty of suing the state or impleading its property had previously been regarded as evidence of a desire where possible to do justice to the individual.<sup>169</sup> Indeed, if Justice Holmes' theory is correct, even voluntary submission to suit would not enable the court to impose damages on the Government, for there never was a liability and none could, it would seem, be created, by merely waiving the immunity from suit. The fact is, we venture to believe, that the theory is unsound, being dominated by a slavish worship of an antiquated conception of absolutism and finding in the absence of a "tort"—a term of private and not of public law—an absence of injury or operative fact of which the courts may properly take account when they can obtain jurisdiction.

#### QUASI-CORPORATIONS

The administrative organization in the United States has developed the county as the largest political subdivision of the State for the performance of what are called "governmental" functions. The county is created by the legislature for purposes of local government, with an elective or appointive official personnel, for the administration of local matters. It is a highly developed form of local self-government in the United States. Included within these so-called *quasi*-corporations—for they were not at first incorporated at all—are counties, towns, school districts, road districts and the like. In view of the fact that the people themselves have so direct a share in the management of these bodies, it is perhaps the more surprising that they were endowed by the courts with the shield of kingly sovereignty, and, with minor exceptions, were and are, in the absence of specific statute, not responsible for the torts of their agents. For us, interest lies in determining the grounds of this immunity.

In the United States, that immunity appears first to have been worked out in New England,<sup>170</sup> where a court of Massachusetts relied upon the

<sup>168</sup> *The Siren* (1868, U. S.) 7 Wall. 152. See also *The Gloria* (1919, S. D. N. Y.) 267 Fed. 929; *The City of Philadelphia* (1920, E. D. Pa.) 263 Fed. 234; *The F. J. Luckenback* (1920, S. D. N. Y.) 267 Fed. 931. *The Olockson* (1922, C. C. A. 5th) 281 Fed. 690. Justice Holmes made an attempt, unconvincing to the writer, to distinguish *The Siren*, *supra*, in *United States v. Thompson*, *supra*. See on the last case, the following comments, only one of which approves the decision of the court: (1922) 31 YALE LAW JOURNAL, 879; (1922) 20 MICH. L. REV. 533; (1922) 10 CALIF. L. REV. 333; (1922) 17 ILL. L. REV. 57 (approves).

<sup>169</sup> (1911) 33 L. R. A. (N. S.) 376. Right of set-off, counter-claim, or recoupment in action by State, note to *State of Arkansas v. Arkansas Brick & Manufacturing Co.* (1911, Ark.) 135 S. W. 843. There is a great divergence among the state courts on this subject. It is not within our immediate purpose to examine this subject. See 25 R. C. L. 411.

<sup>170</sup> *Mower v. Leicester* (1812) 9 Mass. 247, 250. See also the modern English rule in *Gibson v. The Mayor* (1870) L. R. 5 Q. B. 218, 222. On the other hand,

English case of *Russell v. Men of Devon*.<sup>171</sup> In that case, an unincorporated county was held immune from responsibility for an injury arising out of a defective bridge, because it had no corporate fund or the means of obtaining one, and it seemed impracticable to permit judgment to be satisfied out of the assets of possibly a few individuals. Hence the injured individual, for practical reasons, was denied relief. Yet the only similarity between the situation in New England and the *Russell* case lay in the fact that the defendants were counties. The New England county was incorporated, had a corporate fund and the means of enlarging it by taxation and was charged by statute with the duty of keeping highways in repair. Under the authority of *Russell v. Devon*, therefore, practically no reason for immunity can be found in these circumstances to exist, yet the Massachusetts court passed judgment for the defendant on the unconvincing ground that the county was a *quasi*-corporation created by the legislature for purposes of public policy and not voluntarily, like a city, and that as a State agency it was therefore immune. This poorly reasoned decision, based upon a case which contradicts rather than sustains it, has been followed very generally in New England and has become the "common law" of the states of the United States, with few exceptions.<sup>172</sup> That a quite different rule prevails with respect to municipal corporations proper, in the case of highways and bridges, and that the distinctions are curiously sustained, will be presently noted.

As the old reasons for county immunity, mentioned in the *Russell* case, disappeared in fact, new reasons had to be devised. The usual ground was public policy, but on the nature of that policy the courts cannot agree. Only a few courts have gone so far as to suggest that the county is, like the state of which it is a political subdivision, immune from suit without consent.<sup>173</sup> The great majority of the courts, however, have put the immunity from substantive responsibility on the ground that the county was created for public purposes, charged with the performance of duties as an arm or branch of the state government, and cannot therefore be liable for failure or negligence in the perform-

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in Maryland, the distinction between the county in *Russell v. Devon* and the Maryland county, which was a corporation and had a corporate fund, was readily perceived, and liability imposed. *Anne Arundel County v. Duckett* (1864) 20 Md. 468.

<sup>171</sup> (1789, K. B.) 100 Eng. Rep. 359. The immunity is more correctly explained historically in that no action on the case lay by a private individual against a town or county for the omission of a public duty; the correct procedure was by indictment. Bro. Abr., "Accion sur la case," pl. 93.

<sup>172</sup> 4 Dillon, *Municipal Corporations* (5th ed. 1911) sec. 1688 and cases cited in 13 R. C. L. 306-307, notes 2 and 3, and 2 A. L. R. 721, note. The exception is practically confined to Iowa, Maryland and Pennsylvania, i. e. in the absence of a specific statutory liability.

<sup>173</sup> *Heigel v. Wichita County* (1892) 84 Tex. 392, 19 S. W. 562 (dictum, referring to "other courts"). *McDermott v. Delaware County* (1915) 60 Ind. App. 209, 110 N. E. 237.

ance of its public—sometimes even called corporate—duties. The alleged distinction in this respect between counties and municipal corporations proper is said to lie in the further fact that counties and so-called *quasi*-corporations generally are involuntary political divisions of the state organized without regard to the consent of the inhabitants, whereas municipal corporations proper, it is said, are voluntary associations organized under a franchise or charter from the State at the request and for the benefit and local advantage and convenience of the inhabitants.

The language of the Supreme Court of Texas in the case of *Heigel v. Wichita County*<sup>174</sup> is typical of that used by many other courts to explain the distinction:

"Counties," said the Court, "are not corporations in the fullest sense of that term. They are commonly called '*quasi*-corporations.' They are created by the state for the purposes of government. Their functions are political and administrative, and the powers conferred upon them are rather duties imposed than privileges granted. Cities, on the other hand, are deemed voluntary corporations, and, while they exercise political functions, it is considered that their charters are granted not so much with a view to the interests of the public as for the private advantage of their citizens. It is upon this distinction that the courts ordinarily base the difference in the rule of liability as applied to municipal corporations proper, and to quasi-municipal corporations, such as counties and townships. Other courts hold that, since a county is but a political subdivision of the state, a suit against the county is, in effect, a suit against the state, and that, therefore, an action will not lie without the consent of the legislature. But upon whatever ground it should be placed, it is fairly well settled that in cases like this [injury sustained by reason of a defective bridge] cities are liable and counties are not."<sup>175</sup>

The precedents making this alleged distinction are so numerous that it is probably heresy to suggest that the formal differences to which the courts direct attention are without substantial merit or justification for a difference in doctrine. Both county and city are created by the people, often the same people, appropriately represented, for the purpose of better administering their public business<sup>176</sup> and the distinctions made, as we shall have further occasion to observe hereafter, are for the most part artificial and have been repudiated, though not always with the same result, by a number of courts.

<sup>174</sup> *Supra*, note 173.

<sup>175</sup> See also for similar expressions of the distinction, *Madden v. Lancaster County* (1894, C. C. A. 8th) 65 Fed. 188; *El Paso County v. Bish* (1893) 18 Colo. 474, 33 Pac. 184; *Millwood v. De Kalb County* (1899) 106 Ga. 743, 32 S. E. 577, and cases cited in 2 A. L. R. 722.

<sup>176</sup> See the New York statute of 1892, Cons. Laws, 1909, ch. 11, art. 2, sec. 3, declaring counties municipal corporations: "A county is a municipal corporation, comprising the inhabitants within its boundaries, and formed for the purpose of exercising the powers and discharging the duties of local government, and the administration of public affairs conferred upon it by law."

Statutes have frequently created the county a corporation or municipal corporation with power to sue or be sued, or have charged the county or county commissioners with the duty of taking care of or repairing highways, bridges, public buildings and other specific public property. On the alleged ground that these statutes are in derogation of the common law, the courts have for the most part given them a very narrow construction. For example, a statute creating the county a corporation with power to be sued was regarded as extending only to contracts and not to the torts of its agents.<sup>177</sup> In other courts, the statute has not been regarded as diminishing the common-law immunity of counties,<sup>178</sup> though the existence of the statute often induces an investigation into the distinction between governmental and corporate functions which is the distinctive feature of municipal responsibility in tort. So, though the statute imposes the duty of maintaining highways, bridges or buildings in good repair, this has been held not to impose any liability to an injured individual for failure properly to perform the statutory duty.<sup>179</sup> For this purpose, many courts require very specific language.<sup>180</sup> And the statutes will not be extended beyond the exact subject-matter embraced in them or beyond their plain terms.<sup>181</sup> Some of the states which, by judicial construction, allow a county liability for defective bridges, refuse to extend the same rule to roads and highways or to county buildings, as in Iowa. Indeed, in Iowa, the size of the bridge is an important operative fact, for small bridges are not covered by that court's exceptional rule imposing liability on counties for negligently defective bridges.<sup>182</sup> Attention may be called to the quite unusual statute of Connecticut which imposed liability upon the county for damage to the creditor by debtor prisoners escaping from defective jails.<sup>183</sup> Injuries to private property inflicted in the construction of public works, if done in states where "damage" to private property is deemed the subject of eminent domain, may impose liability upon the county, but by the weight of authority it seems

<sup>177</sup> *Wood v. Tipton County* (1874, Tenn.) 7 Bax. 112.

<sup>178</sup> *Hughes v. County of Monroe* (1895) 147 N. Y. 49, 41 N. E. 407; *Markey v. Queens County* (1898) 154 N. Y. 675 and the exhaustive note in 39 L. R. A. 33.

<sup>179</sup> *Barnett v. Contra Costa County* (1885) 67 Calif. 77, 7 Pac. 177; *Snethen v. Harrison County* (1915) 172 Iowa, 81, 152 N. W. 12. *Sinkhorn v. Lexington Turnpike* (1901) 112 Ky. 205, 65 S. W. 356.

But other courts have held that the duty to maintain implies responsibility for neglect or failure. *Milkwood v. De Kalb County*, *supra* note 175; *Cones v. Benton County* (1893) 137 Ind. 404, 37 N. E. 272; *Richardson v. Kent County* (1913) 120 Md. 153, 87 Atl. 747, and cases in 2 A. L. R. 724.

<sup>180</sup> See statutes of Michigan, Nebraska, Ohio, West Virginia, South Carolina, cited with judicial authority in 2 A. L. R. 724 and statutes in Alabama, Georgia, Kansas, Massachusetts and New Jersey discussed in 39 L. R. A. 43.

<sup>181</sup> *Franklin County v. Darst* (1917) 96 Ohio St. 163, 117 N. E. 166.

<sup>182</sup> *Taylor v. Davis County* (1875) 40 Iowa, 295; *Chandler v. Freemont County* (1875) 42 Iowa, 58.

<sup>183</sup> Gen. Stat. 1918, sec. 1992. *Dutton v. Litchfield County* (1792) 1 Root, 450.

difficult to construe most injuries, for which there is a general immunity, as a "damage" under eminent domain.<sup>184</sup> In New Jersey and Louisiana there is county liability for negligence in operating drawbridges;<sup>185</sup> in many states, a county is held liable for infringement of patents;<sup>186</sup> but unless a county has received the benefit of a money payment, it is not liable for the defalcations of a county treasurer or other officer of the county. This is the usual rule as to officers receiving moneys from the public, for deposit or otherwise, and in so far as they are trustees for the owner, it seems unjust for the county or other public corporation to repudiate liability for an officer whom it holds out to the public as responsible and to throw the risk of his integrity upon the particular member of the public dealing with him.

Enough has been said to show that the rules relating to the liability of counties and other *quasi*-corporations—some of which, like school districts, we have already adverted to—for the torts of their officers and agents have remained stagnant in the face of great social and even legal changes, and are supported on reasons which, to say the least, cannot command respect. The subject requires fundamental re-examination. In view of the close legal approximation between the incorporated county and the municipal corporation, it is believed that no valid ground for a distinction between the two, so far as concerns liability in tort, any longer exists. Indeed, it is believed that with the deflation of the conception of sovereignty and the realization that all political group organizations, from the smallest to the largest, are merely means adopted by the people to enable them to perform certain public services, that there is no sound reason either for differentiating their responsibility according to size or form of organization or to grant them immunity for the torts of their agents and employees.

(To be continued)

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<sup>184</sup> In California and Pennsylvania a constitutional provision imposes liability; in Maryland and perhaps in Pennsylvania legal liability is implied. Cases in 39 L. R. A. 63 *et seq.*

<sup>185</sup> *Ripley v. Essex and Hudson County Free Holders* (1878) 40 N. J. L. 45; *Houston v. Police Jury* (1848) 3 La. Ann. 566.

<sup>186</sup> Cases in 39 L. R. A. 73.